92-359 (1)

Supreme Court, U.S.
FILED
MAY 11 1992
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

—v.—

LEONARD ADAMS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

Of Counsel:

STUART E. RICKERSON
Vice President–
General Counsel
Keene Corporation
200 Park Avenue
New York, New York 10166
(212) 557-1900

ANDREW T. BERRY
Counsel of Record
GITA F. ROTHSCHILD
MCCARTER & ENGLISH
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(201) 622-4444

Attorneys for Petitioner, Keene Corporation

QUESTIONS PRESENTED

Petitioner Keene Corporation, a defendant in nearly ninety-thousand asbestos-related products liability actions nationwide, was assessed twenty-one separate punitive damages verdicts in these consolidated cases for the identical course of conduct. These punitive damages verdicts, and the other $13 million in punitive awards against Keene, cannot be justified on any constitutional or doctrinal basis. Keene petitions this Court to stop, once and for all, the unwarranted, unjustifiable and unconstitutional imposition of repetitive punitive damages in asbestos litigation. The specific questions presented are:

1. Whether the imposition of repetitive punitive damages awards for

the same course of conduct violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the unexplained and arbitrary refusal of the West Virginia Supreme Court of Appeals to follow this Court's directive in Pacific Mut. Life Ins. Co. v. Haslip, and its own directive in Garnes v. Fleming Landfill, Inc. to review the punitive damages verdicts in these cases violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, especially where another jury, hearing the exact same evidence at the same time and place and under the same legal "standard" found no punitive damages.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceedings below include petitioner, Keene Corporation (defendant below), and respondents Leonard Adams (and his wife, Lucille Adams), Garlen Burton (and his wife, Ann Burton), George Campbell (and his wife, Barbara Campbell), Leslie Carr (and his wife, Ruth Carr), John Chapman, Arville Dalton (and his wife, Ethell Dalton), James Darrah (and his wife, Patricia Darrah), Paul Dunn, Terry England, William Gabbert, George Hoschar (and his wife, Alice Hoschar), Everett Johnson (and his wife, Mary Johnson), James Kirk (and his wife, Lois Kirk), William Little (and his wife, Hilda Little), Foster Lipscomb, Nelson Lott (and his wife, Wilda Lott), G.V. Mehalic (and his wife, Evelyn Mehalic), Jeryl Root (and his

wife, Dorothy Root), Stanley Rowe (and his wife, Linda Rowe), Joseph Sberna (and his wife, Sandra Sberna) and Joseph Shilot (and his wife, Myrtle Shilot) (plaintiffs below).

Owens-Corning Fiberglas Corp., a defendant in the proceedings below, is filing a separate petition for writ of certiorari with this Court.

Armstrong World Industries, Inc., Fibreboard Corp., Garlock, Inc., GAF Corp., National Gypsum Co., U.S. Gypsum Co. and Flexitallic, Inc. were defendants at trial below but settled their differences with plaintiffs prior to return of a verdict and entry of judgment, and were not parties to the petition for an appeal to the West Virginia Supreme Court of Appeals.

Nitro Industrial Coverings initially was a defendant at trial but was

dismissed on directed verdict at the close of plaintiffs' case. Since that litigant was dismissed prior to return of the jury's verdict and entry of judgment, it was not a party to the petition for an appeal to the West Virginia Supreme Court of Appeals.

Pursuant to Rule 29.1, Keene Corporation states that it is a publicly-held corporation which has no parent company and no affiliates or other than wholly owned subsidiaries.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED..... i

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT..... iii

TABLE OF AUTHORITIES..... viii

OPINIONS BELOW..... 2

JURISDICTION..... 3

CONSTITUTIONAL PROVISION INVOLVED..... 4

STATEMENT OF THE CASE..... 5

REASONS FOR GRANTING THE WRIT

I. THE IMPOSITION OF REPETITIVE PUNITIVE DAMAGES AWARDS FOR THE SAME COURSE OF CONDUCT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION..... 21

1. Multiple Punitive Damages Awards for the Same Course of Conduct in This, or Any Other Asbestos Case, do not Further the Societal Goals of Punishment and Deterrence..... 21

2. Additional Awards of Punitive Damages Serve Only to Reward Lawyers While Undermining Legitimate Societal Goals..... 31

3. Additional Punitive Damages Awards Would Violate the Right of Defendants not to be Punished Repeatedly for the Same Conduct..... 41

II. THE FAILURE OF THE TRIAL COURT AND THE SUPREME COURT OF APPEALS OF WEST VIRGINIA TO EVALUATE THE PUNITIVE DAMAGES VERDICTS, IN ACCORDANCE WITH THIS COURT'S RULING IN PACIFIC MUTUAL LIFE INSURANCE CO. v. HASLIP, VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. 45

CONCLUSION..... 63

APPENDIX.....(separately bound)

TABLE OF AUTHORITIES

PAGE

Cases:

Adams v. Armstrong World Industries, No. 86-C-764 (Circuit Court of Monongalia County, West Virginia..... 9

Blue v. Johns-Manville Corp., 10 Phila. 23 (Phil. Ct. Comm. Pleas Oct. 12, 1983) aff'd, 496 A.2d 848 (Pa. Sup. Ct.1985)..... 39

Fleming Landfill, Inc. v. Garnes, 111 S. Ct. 2882 (1991)..... 15, 16 49, 53, 54

Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991).... 16-18 49, 50, 51-53, 54, 55

Giacco v. Pennsylvania, 382 U.S. 399 (1966)..... 22

Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989)..... 46

In re "Agent Orange" Product Liability Litig., 100 F.R.D. 718 (E.D.N.Y. 1983)..... 24

In re Asbestos Products Liability Litigation (No. VI), 771 F. Supp. 415 (J.P.M.D.L. 1991)..... 36

In re Johns-Manville Corp., 129 B.R. 710 (E.D.N.Y. 1991)..... 34

In re Northern District of Cal. "Dalkon Shield" IUD Products Liability Litig., 526 F. Supp. 887 (N.D. Cal. 1981), vacated on other grounds, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983)..... 24, 43

Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053 (D.N.J. 1989), vacated on other grounds, 718 F. Supp. 1233 (D.N.J. 1989).....24 30, 33, 34

Lassiter v. Department of Social Services, 452 U.S. 18 (1981)..... 21

Magallanes v. Superior Court, 213 Cal. Rptr. 547 (Cal. Ct. App. 1985)..... 37

Pacific Mutual Life Insurance Company v. Haslip, 111 S. Ct. 1032 (1991).....14-18 21-26, 45-51 54-56 61-62, 63

Racich v. Celotex Corp., 887 F.2d 393 (2d Cir. 1989)..... 37

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967)..... 24, 30

United States v. Halper, 490 U.S. 435, 109 S. Ct. 1892 (1989)..... 42

Wells v. Smith, 297 S.E.2d 872 (W. Va. 1982).... 48-49 50

Constitutional Provision:

U.S. Const. amend. XIV, § 1..... 4

Statutes:

28 U.S.C. § 1257(a) (1988)..... 3

Miscellaneous Authorities

Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 Cardozo L. Rev. 181 (1992)..... 26, 28 30, 32, 38, 39, 40

Hensler, Asbestos in the Courts, The Challenge of Mass Toxic Torts (Rand Corporation Institute for Civil Justice, 1985)..... 27

Judicial Conference Ad Hoc Committee on Asbestos Litigation, 1991 Report..... 35

Keene Corporation, 1991 Annual Report (Jan. 20, 1992)..... 19

Keene Corporation, Form Q-10 (for the quarterly period ending June 30, 1992)..... 12, 20

Keene Corporation, Report to Stockholders Presented at Annual Meeting, April 21, 1992 (July 9, 1992)..... 19

Keene Corporation, Second Quarter Report (for the Period Ending June 30, 1992)..... 19

Mahoney and Littlejohn, Innovation on Trial: Punitive Damages Verdicts vs. New Products, Science (December 15, 1989)..... 39

Oliver, Who Will the Asbestos Monster Devour Next?, Forbes, February 18, 1991..... 27, 28, 38

Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (1991)..... 35

Schwarzer, Punishment Ad Absurdum, 11 Cal. Law. 116 (Oct. 1991)..... 40

Wall Street Journal, "With Punitive Damages, Let the Foreigner Beware," March 18, 1992..... 32-33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. _____

KEENE CORPORATION,

Petitioner,

--v.--

LEONARD ADAMS, *et al.*,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

Petitioner, Keene Corporation [hereinafter "Keene"], respectfully prays that a writ of certiorari issue to review the March 11, 1992 judgments of the Circuit Court of Monongalia County, West Virginia which the Supreme Court of Appeals for the State of West Virginia refused to review by an order entered in this proceeding on May 13, 1992.

OPINIONS BELOW

The order of the Supreme Court of Appeals for the State of West Virginia refusing Keene Corporation's petition for appeal is unpublished and appears in slip opinion form in the appendix hereto at pages A-101 to A-102.[1] No opinion accompanied the Order.

The Orders of the Circuit Court of Monongalia County, West Virginia, denying

---

[1] Hereinafter, citations to the appendix will be stated as PA-___.

defendants' post trial motions and entering judgment are unpublished and appear in slip opinion form in the appendix hereto at PA-2 to PA-100.

JURISDICTION

The Order of the Supreme Court of Appeals for the State of West Virginia denying Keene Corporation's petition for appeal was entered on May 13, 1992. The Orders of the Circuit Court of Monongalia County, West Virginia, denying defendants' post trial motions and entering judgment were entered on March 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, amendment XIV, § 1, is reprinted in the Appendix at A-1.

STATEMENT OF THE CASE

Twenty-one plaintiffs[2] and their respective spouses,[3] filed civil actions in the Circuit Court of Monongalia County, West Virginia, alleging personal injury and loss of consortium due to plaintiffs' occupational exposure to asbestos and asbestos-containing products during their employment at various industrial and commercial jobsites throughout West Virginia and surrounding states. Plaintiffs alleged that they were exposed to asbestos-containing

---

[2] Leonard Adams, Garlen Burton, George Campbell, Leslie Carr, John Chapman, Arville Dalton, James Darrah, Paul Dunn, Terry England, William Gabbert, George Hoschar, Everett Johnson, James Kirk, William Little, Foster Lipscomb, Nelson Lott, G.V. Mehalic, Jeryl Root, Stanley Rowe, Joseph Sberna and Joseph Shilot.

[3] Lucille Adams, Ann Burton, Barbara Campbell, Ruth Carr, Ethell Dalton, Patricia Darrah, Alice Hoschar, Mary Johnson, Lois Kirk, Hilda Little, Wilda Lott, Evelyn Mehalic, Dorothy Root, Linda Rowe, Sandra Sberna and Myrtle Shilot.

products manufactured, supplied or installed by nineteen different defendants, including petitioner Keene. Plaintiffs further alleged injuries ranging from non-disabling pleural thickening to various cancers. Each and every plaintiff's Complaint included claims for both compensatory and punitive damages. The wording of each plaintiff's punitive damages claim was identical.

Due to settlements, dismissals and bankruptcies of certain defendants, ten defendants[4] remained at the time of trial. Asserting "judicial economy" as a justification, the court consolidated for trial the claims of the plaintiffs at bar

---

[4] Armstrong World Industries, Inc., Fibreboard Corp., Garlock, Inc., GAF Corp., National Gypsum Co., U.S. Gyspsum Co. and Flexitallic, Inc. settled during the course of the trial. Nitro Industrial Coverings was dismissed on directed verdict at the close of plaintiffs' case. Owens-Corning Fiberglas Corp. and Keene Corporation remained at the time of the jury's verdict.

[hereinafter the "plaintiffs" or the "Adams group"] with those of another group of fifteen additional claimants and their respective spouses [hereinafter the "Barnes group"][5]. The cases were divided into two courtrooms with the Hon. Larry V. Starcher presiding over the trial of the twenty-one claims from Adams' group and the Hon. Robert B. Stone presiding over the trial of the fifteen claims in the Barnes group. The trials commenced with opening statements on October 17, 1990, before two separate juries and proceeded simultaneously.

At certain points during the course of the trial, *both* juries (and both judges, and both sets of attorneys), convened in a single courtroom to hear

---

[5] Keene is not petitioning for a writ of certiorari with respect to the verdicts in the Barnes group.

the testimony of "common" witnesses, that is, witnesses who were not presenting testimony peculiar to any single plaintiff in either courtroom. This included the opening statements and all witnesses testifying on the issue of punitive damages. Thus, the juries in the two separate trials heard literally the identical evidence with respect to the punitive damages claims made against Keene and the other defendants.

Prior to submission of the case to the jury, Keene moved to strike plaintiffs' punitive damages claims. At the close of plaintiffs' case, the following exchange took place:

> MR. HENDRICKSON: Your Honor, at this time, too, I would move for a directed verdict on behalf of my client, Keene Corporation, on the issue of punitive damages. I am not going to go into all the constitutional basis [sic] because you have heard those

> arguments before, and I assume that your rulings on the constitutional basis will remain the same as they were in the past.
>
> THE COURT: Law is still the same. We think some day it may change, but as of today it is still the same.
>
> MR. HENDRICKSON: I am not going to waste your time, and they would be incorporated into the record.

Trial Transcript, Adams v. Armstrong World Industries, No. 86-C-764 (Circuit Court of Monongalia County, West Virginia) [hereinafter "Trial tr."] 11/2/90, Vol. XII, p.2815, L.10 to L.24.[6] The trial court, having previously ruled on similar motions in other asbestos trials, summarily denied

---

[6] The constitutional arguments to which counsel for Keene referred include arguments that multiple punitive damages awards for the same course of conduct, and the lack of adequate standards under West Virginia law, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. These arguments were more fully set forth in Keene's motion papers to the trial court, which appear in the appendix hereto at PA-103 to PA-185.

Keene's motions without further argument.

Judge Starcher charged the jury in this case on the issue of punitive damages as follows:

> The court instructs the jury that under West Virginia law a defendant may be held liable for punitive damages in the actions of tort [sic] such as this if the evidence reveals that a defendant in an action where punitive damages are sought was guilty of gross fraud, malice, oppression, or wanton, willful or reckless misconduct or criminal indifference to civil obligations affecting the rights of others. Therefore, you are instructed that if you believe that either defendant corporation was guilty of gross fraud, malice, oppression, or wanton, willful or reckless misconduct or criminal indifference to its civil obligations, then you may award punitive damages against said defendant.
>
> The court instructs the jury that punitive damages are awarded to punish a defendant and to deter others from pursuing a like course of conduct. The amount of punitive damages awarded, when

> considered together with compensatory damages, should be in such amount as the jury believes is sufficient to deter others from engaging in a like course of conduct.

Judge's Charge to Jury, Nov. 8, 1990, p.13, L.13 to p.14, L.3. Judge Stone gave literally the identical charge to the Barnes jury.

On November 13, 1990, the Adams jury returned a verdict in favor of plaintiffs for a total of $1,217,040 in compensatory damages -- 15% of which was assessed against Keene in each case. In addition, the jury was asked the following question as to each plaintiff:

> Do you find from a preponderance of the evidence that [plaintiff] should recover *punitive* damages from any of the following defendants because of having acted in a malicious, oppressive, wanton, willful or reckless manner? (emphasis in the original).

The jury answered "yes" as to Keene in each case, and made identical $5,000 punitive damages awards to each of the twenty-one Adams plaintiffs.[7]

On November 15, 1990, the Barnes jury returned a verdict. In the Barnes group, Keene's liability for various plaintiffs' compensatory damages ranged from 0% to 7%, with the majority of findings around 2%. Furthermore, after considering the identical evidence on which the Adams jury imposed punitive damages against Keene, the Barnes jury found that Keene was *not* liable for punitive damages.

Keene thereafter filed post trial motions, arguing, *inter alia*, that the trial court erred in submitting the issue

---

[7] The conduct "punished" was precisely the conduct for which $13 million in punitive damages have been awarded in other cases. *Keene Corporation Form 10-Q* for quarterly period ending June 30, 1992.

of punitive damages to the jury because the awards of punitive damages in these cases violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as well as analogous provisions of the West Virginia Constitution. In addition, Keene argued that punitive damages are inappropriate as a matter of public policy in asbestos-related multi-plaintiff products liability litigation. On March 11, 1991, the trial court summarily denied all defendants' post-trial motions and entered Judgment Orders in all cases. The trial court supplied no basis for its denial of the motions, and in particular, gave no indication that it considered any set of criteria for evaluating the propriety of the jury's punitive damages awards.

On March 4, 1991, this Court issued its opinion in Pacific Mutual Life Insurance Company v. Haslip, 111 S. Ct. 1032 (1991), which examined the issue of whether an award of punitive damages could violate the Fourteenth Amendment's Due Process Clause. In holding that punitive damages proceedings do implicate due process protections, this Court declared that the Due Process Clause imposes both substantive and procedural limitations on awards of punitive damages. 111 S. Ct. at 1044-46. Substantively, an award may not exceed the amount required to meet the societal goals of deterrence and retribution, while procedurally, adequate mechanisms must be in place to ensure that an award of punitive damages is not constitutionally excessive. Id. at 1044-45. This Court then upheld the Alabama

scheme for awarding punitive damages, which included detailed criteria to be examined during post-trial review of all punitive damages verdicts. Id. at 1044-46.

Shortly after rendering its decision in Haslip, on June 28, 1991, this Court granted a petition for writ of certiorari to the Supreme Court of Appeals of West Virginia in the case of Fleming Landfill, Inc. v. Garnes, 111 S. Ct 2882 (1991). This Court vacated the judgment in that case, which included an award of punitive damages, and remanded it to the Supreme Court of Appeals of West Virginia for further consideration in light of the Haslip decision. Id.

On September 11, 1991, Keene filed a Petition for Appeal with the Supreme Court of Appeals for the State of West Virginia. Once again, Keene argued that

the submission of plaintiffs' punitive damages claims violated the United States and West Virginia Constitutions. In addition to the arguments raised before the trial court, Keene emphasized that this Court's holding in Haslip, especially in light of its decision in Fleming, unequivocally demonstrated the unconstitutionality of the West Virginia scheme under which the punitive damages were awarded in these cases.

Thereafter, on December 5, 1991, the Supreme Court of Appeals for West Virginia issued its opinion on remand in Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991). The Garnes court reversed the trial court judgment awarding punitive damages, correctly finding that the then-existing West Virginia punitive damages scheme was unconstitutional under this Court's

opinion in Haslip. Id. at 910. The court directed that, upon remand, the trial court was to "carefully explain [to the jury] the factors to be considered in awarding punitive damages." Id. at 908-9. The Garnes court then listed the factors to be considered, which recreated nearly verbatim the list of factors considered under the Alabama scheme as they appeared in this Court's opinion in Haslip. Id. at 909. The Garnes court further held that the trial court and appellate court, upon review, must consider certain additional factors, again taken nearly verbatim from Haslip. Id. Finally, the court held that a trial court is required to "thoroughly set out the reasons for changing (or not changing) the award." Id. at 910.

But in the face of its own ruling in Garnes striking as unconstitutional the

same West Virginia punitive damages scheme applied in the Adams cases at bar, the Supreme Court of Appeals inexplicably refused defendants' petitions for appeal on May 13, 1992. The court gave no reason for its decision. Indeed, the court did not explain why it did not vacate the judgment and remand the case to the trial court in accordance with its own decision in Garnes. Nor did the court explain why the punitive damages verdicts in these cases did not violate defendants' due process rights, given the fact that neither the jury nor the reviewing court considered any of the factors which the Haslip and Garnes courts held were constitutionally mandated.[8]

---

[8] Haslip mandates that a court reviewing the punitive awards at bar should have evaluated the following facts with respect to Keene.

Keene is a custom manufacturer of heat-absorbing composites, sheet molding compounds and -

structural composite components for a variety of aerospace, defense and commercial applications. *Keene Corporation Second Quarter Report for the Period Ending June 30, 1992 and a Report to Stockholders Presented at the Annual Meeting April 21, 1992* (July 9, 1992) (hereinafter "*Second Quarter Report*").

Keene has never manufactured or sold any asbestos-containing products. Keene, however, is a defendant in asbestos cases because, in its second year of existence in 1968, Keene acquired substantially all of the stock of Baldwin-Ehret Hill, Inc. ("BEH"), for $8 million. Before 1972, a small portion of BEH's product line was insulation materials, of which a few included small amounts of asbestos to meet customers' specifications. (The fiber purchased by BEH accounted for less than 1% of all asbestos fiber used annually in the United States). In 1972, only four years after Keene purchased the company, BEH stopped manufacturing products containing asbestos. The BEH division was never profitable during the years it was owned by Keene. By 1975, the entire insulation division was shut down. *Keene Corporation Annual Report, 1991* (January 20, 1992) (hereinafter "*1991 Annual Report*")

By the time Keene purchased BEH, health hazard warnings were being placed on BEH products. During the entire period Keene's subsidiaries made products containing asbestos (1968-1972) the product carried a warning label. *1991 Annual Report*

Despite this modest history and Keene's lack of culpability for the acts of its predecessors, Keene already has spent nearly $400 million in asbestos-related personal injury litigation. Of this amount, the bulk of the money - over one quarter billion dollars - has been indemnity payments to claimants and their lawyers. Keene has been sued over 156,000 times; although it has settled or tried nearly 78,000 cases, it still faces approximately 87,000 claims. New filings continue unchecked; 50% more cases have been filed to date in 1992 against Keene than in the comparable period in 1991. New filings outpace settlements and other

Keene thereafter filed this Petition for a Writ of Certiorari.

---

dispositions by nearly two-to-one. In a widely publicized asbestos compensation program in July, 1990, Keene offered $190 million-- approximately 80% of its net worth - in addition to what it had spent already, to resolve all meritorious personal injury claims. Over 25,000 claims have been settled under this program. *Second Quarter Report*.

In the past twenty-four months, approximately 500 jury verdicts had been returned against Keene in asbestos-related bodily injury cases, of which 251 remained outstanding. With trials continuing nearly every day, the numbers change constantly, but as of August 3, 1992, the outstanding verdicts totaled approximately $70 million in compensatory damages, of which approximately $13 million were punitive damages awards. These punitive damages awards all have been assessed for the identical course of conduct - BEH's production of asbestos insulation. By June 30, 1992, Keene's net worth had been reduced to approximately $134 million with an additional $58 million in insurance coverage believed to be available for the asbestos liabilities. *Keene Corporation Form 10-Q*, for quarterly period ending June 30, 1992.

REASONS FOR GRANTING THE WRIT

I.

THE IMPOSITION OF REPETITIVE PUNITIVE DAMAGES AWARDS FOR THE SAME COURSE OF CONDUCT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

1. Multiple Punitive Damages Awards for the Same Course of Conduct in This, or Any Other Asbestos Case, do not Further the Societal Goals of Punishment and Deterrence

The Due Process Clause of the Fourteenth Amendment to the United States Constitution embodies a requirement of "fundamental fairness" in both criminal and civil proceedings - "a requirement whose meaning can be as opaque as its importance is lofty." See, Lassiter v. Dept. of Social Services, 452 U.S. 18, 24-25 (1981). Under this Court's recent decision in Pacific Mutual Life Ins. Co.

v. Haslip, 111 S. Ct. 1032 (1991), the punitive damages imposed in this case, even though small in amount[9], violate the "fundamental fairness" requirement of the Due Process Clause.

Addressing a due process challenge to the common law system of awarding punitive damages, this Court in Haslip repeated its concern about punitive damages that 'run wild,'" and firmly rejected the idea that the imposition of

---

[9] Keene acknowledges that twenty-one punitive damages verdicts of $5,000 each, which cumulatively approximate the annual salary of two Supreme Court clerks, are not likely to incite a great deal of indignation. Indeed, Keene does not suggest that the *size* of the punitive awards in *these* cases carries any constitutional implications, although the fact that there are additional punitive verdicts (totalling $13 million) against Keene is not irrelevant. Size notwithstanding, these verdicts represent a violation of Keene's constitutional rights. In Giacco v. Pennsylvania, 382 U.S. 399 (1966), this Court found that an overly vague state statute violated a defendant's due process rights, even though the civil penalty imposed by the jury in that case was only $230.95 (the civil penalty assessed in these cases was 456 times greater).

punitive damages "is never unconstitutional." Id. at 1043.

Haslip established that the Due Process Clause imposes both substantive and procedural limitations on awards of punitive damages. 111 S.Ct. at 1044-46. Substantively, an award may not exceed the amount required to meet the societal goals of deterrence and retribution. Id. at 1044-45. Procedurally, a system of awarding punitive damages must provide adequate mechanisms for ensuring that an award of punitive damages is not constitutionally excessive - that is, that the award furthers the goals of deterrence and retribution. Id.

The standards set forth by this Court in Pacific Mutual Life Ins. Co. v. Haslip provided the much-needed doctrinal

foundation[10] for addressing the constitutional concerns of repetitive punitive damages. While many courts in the past have railed against the injustice of multiple punitive damages

---

[10] Prior to Haslip, many courts gave lip service to the concept that multiple awards of punitive damages violate the Due Process Clause of the Fourteenth Amendment. In Juzwin v. Amtorg Trading Corp., 705 F.Supp. 1053 (D.N.J. 1989) vacated on other grounds 718 F.Supp. 1233 (D.N.J. 1989), the court concluded in an asbestos case that "due process places a limit on the number of times and extent to which a defendant may be subject to punishment for a single course of conduct." Id., 705 F.Supp. at 1064; See also, In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 900 (N.D. Cal. 1981) vacated on other grounds, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983). Indeed, as early as 1967, Judge Friendly expressed serious concerns about the award of repetitive punitive damages in mass tort situations: "We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967). See also, In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction.")

However, lacking the necessary doctrinal foundation, each of these courts declined to declare outright that multiple awards of punitive damages violate the Due Process Clause.

awards for the same course of conduct, Haslip provides, for the first time, a framework within which to evaluate the constitutional implications of multiple punitive damages awards. This petition presents, for the first time since Haslip, an opportunity for this Court to apply those standards to the intolerable morass represented by asbestos litigation.

The mandate of Haslip, established in a single case involving a single punitive damages award, is considerably more compelling in this case, where the jury assessed twenty-one separate punitive damages verdicts for the identical course of conduct.[11] Indeed,

---

[11] There can be *no* question that the punitive damages awarded in these cases was for the same course of conduct. Although there were twenty-one separate plaintiffs, the jury heard only one set of evidence in support of all twenty-one plaintiffs' punitive damages claims. The evidence the jury considered was wholly

multiple awards of punitive damages for the same course of conduct is routine in asbestos litigation: $13 million against Keene alone and more than $300 million against defendants in the aggregate between 1987 and 1990.[12] The punitive verdicts in these cases, and the total failure of the reviewing courts to review them under the constitutional standards mandated in Haslip, is merely a microcosm of the asbestos litigation nationwide, where courts routinely ignore legal precedent if they believe it will help move cases. Implicit in the Haslip standards is the necessity of considering

---

generic and not peculiar to the claims or injuries of any single plaintiff. This is best evidenced by the fact that the jury assessed $5,000 in punitive damages for each and every plaintiff's claim, irrespective of the injury sustained by that plaintiff or the amount of the compensatory verdict.

[12] Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 Cardozo L. Rev. 1819, 1868 n.198 (1992) [hereinafter "Brickman"].

the state of asbestos litigation nationwide.

Neither the goal of punishment nor deterrence is furthered by the repeated imposition of punitive damages against *any* defendant in *any* asbestos case. "[T]here can be no even vague assurance that the social function of punitive damages has not been exceeded many times over...." Hensler, Asbestos in the Courts, The Challenge of Mass Toxic Torts (Rand Corporation Institute for Civil Justice, 1985) [hereinafter "Hensler"], at xxix - xxx. If the purpose of punitive damages is to punish, previous awards of punitive damages, as well as more than $9 billion[13] spent in defense

---

[13] See, Oliver, Who Will the Asbestos Monster Devour Next?, Forbes, February 18, 1991, at 75, 79 [hereinafter "Forbes"]. The transaction costs associated with asbestos cases are higher than for any other type of tort litigation for which figures are available. Hensler, at xxvii. The Rand Institute estimates

and compensation,[14] surely are punishment enough.[15]

Similarly, the deterrence rationale does not apply to asbestos cases, since many defendants, like Keene, never manufactured any asbestos-containing products and most others have not manufactured such products for decades. As to other producers of other products,

---

that 63% of all costs expended in the asbestos litigation are consumed as "transaction costs," the majority of which are attorneys' fees. Id. at 3. This means that, of the approximately $9 billion expended so far, approximately $3.3 billion has gone to compensate victims, while more than $5.7 billion has gone to the lawyers.

[14] Forbes, supra at 79. "Pending cases could cost another $20 billion.... [T]he final tab could hit $50 billion or even $100 billion." Id.

[15] Asbestos defendants also have been repeatedly "punished" by being forced to pay enhanced levels of compensation due to doctrine of joint and several liability coupled with the bankruptcy of the majority of the asbestos producing market. "Driven by the need to fill the financial void created by the bankruptcy [of Johns-Manville] or else have to deny adequate compensation to meritorious claimants, courts and claimants have determinedly imposed Manville's former liability share upon others. Brickman, supra, at 1825.

it is nonsense to argue that eliminating multiple punitive damages awards in asbestos cases would reduce their incentive to market safe products, given what they can observe about the current status of asbestos litigation and the actual and threatened bankruptcies of the majority of the defendants. Further imposition of punitive damages will not provide any additional deterrence for manufacturers of asbestos-containing products, or any other products.

The resources available to compensate plaintiffs and their lawyers are limited. Given the huge sums already collected, punitive damages undeniably are windfalls for the few at the expense of thousands of future claimants. If Keene is forced to defend and pay repeated punitive damages awards, Keene's financial resources - indeed the

resources of all of the defendants - will be tapped beyond their capacity. The Roginsky court cautioned that "a sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin." 378 F.2d at 841. The Juzwin court recognized, "[t]he right to assess punitive damages in mass tort litigation permits a jury to punish but not execute a company." Juzwin v. Amtorg Trading Corp., 705 F.Supp. at 1063.[16]

---

[16] Yet, at least sixteen companies already have been forced into bankruptcy or been liquidated as a result of asbestos litigation - more bankruptcies and more lost jobs are not needed to drive the point home. Brickman, supra, note 12, at 1819.

It cannot rationally be argued that any legitimate societal goals - and certainly not those of punishment and retribution - are advanced by additional punitive damages awards in these cases. When punitive damages awards fail to serve those goals, as they fail to do in asbestos cases, their imposition becomes a monstrous violation of defendants' constitutional rights which can no longer be tolerated.

2. Additional Awards of Punitive Damages Serve Only to Reward Lawyers While Undermining Legitimate Societal Goals.

Although several courts have expressed concern that successive punitive damage awards may, as a practical matter, prevent compensation of future claimants, none has done anything about it. Some have even stated or

implied that, if they were to strike punitive claims, plaintiffs in their courtrooms would be disadvantaged as the assets of companies are siphoned off in other jurisdictions where punitive damages were permitted.[17] For example,

---

[17] One of the most honest, yet disturbing, statements of this reality is the testimony of a justice in the court below. Richard Neely, a justice of the West Virginia Supreme Court of Appeals, the court which refused to review this case, confessed: "No matter how responsible I or the other members of our courts want to be as state court judges, we are powerless to improve the overall American products liability system or reduce the exposure of West Virginia manufacturers to the caprice of malice of out-of-state courts and juries. By trying unilaterally to make such improvements, we will succeed only in impoverishing our own state's residents without doing anyone, anywhere, any measurable good. Unless we want to be 'suckers,' as state court judges we must immediately incorporate the latest pro-plaintiff wealth redistribution theories applied in other states into West Virginia's decisional law. If we conceive and apply new wealth distribution theories before anyone else, we can even garner for ourselves more than our fair share of the national product liability insurance pool. Every jurisdiction then, must ultimately follow the most irresponsible state." *Brickman*, supra note 12, at p. 1833 (emphasis in original) (quoting Justice Neely's September 12, 1991 sworn testimony before the Senate Commerce Committee).

Justice Neely was slightly more frank when he bluntly admitted: "[A]s long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so." "With Punitive Damages, Let

the court in Juzwin v. Amtorg Trading Corp., 105 F. Supp. 1053, struck punitive damages, recognizing the serious problem of the depletion of available assets:

> There is a decided risk that the earlier claimants will deplete the available assets to pay later claimants. Such a risk may exist even as to compensatory damages, but it would seem inappropriate to impose repeated penalties on a company if the result is to deny compensatory damages to subsequent claimants. If there is a limited fund, priority should be given to compensating those who have been injured rather than conferring windfalls on those who already have been compensated.

105 F. Supp. at 1055 (emphasis in original). Yet, Judge Sarokin later vacated his order, citing concern about "the court's inability to effectuate its ruling prospectively absent uniformity either through legislation or a Supreme

---

the Foreigner Beware," The Wall Street Journal, March 18, 1992, at p. A-15.

Court decision." Juzwin v. Amtorg Trading Corp., 718 F. Supp. at 1235. The Juzwin court further lamented: "[T]he court is powerless to limit other courts from considering identical punitive damages claims against the same defendants...." Id. at 1236.

Similarly, Judge Weinstein observed in In re Johns-Manville Corp., 129 B.R. 710, 751 (E.D.N.Y. 1991): "[T]here is not enough money available from traditional defendants to pay for current and future claims. Even the most conservative estimates of future claims . . . would lead to a declaration of insolvency." Yet, Judge Weinstein did not declare punitive damages unconstitutional either.

The Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist, challenged Congress to arrive

at a legislative solution to the problem of asbestos litigation.

> [T]he number of defendants - and thus the amount of assets available to satisfy the claims - is limited.... The lapse of time between exposure and disease interjects the undesirable, albeit unavoidable, result of penalizing current investors, operators and employees for the acts of others committed years ago.... The survival and economic viability of these businesses affect the livelihood of thousands of workers in plants and installations throughout the country, as well as the potential compensation of present and future claimants. The committee believes that any system that wastes assets in this context is a tragedy of major proportions.

Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (1991) at 29. But Congress has not risen to the challenge either.

The Panel on Multidistrict Litigation also has recognized that,

given the number of pending punitive damage claims and the projected growth rate for such claims over the next twenty years, the problems may well increase. In re Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 418-19 (J.P.M.D.L. 1991) (citing Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (1991)). The Panel identified the propriety of permitting further punitive damages awards as a pretrial matter which must be addressed by the transferee court. 771 F.Supp. at 420-21. Although the transferee court has remanded some cases without punitive damages, a general preclusive order has not been entered.

Thus, every court, committee or legislature which has looked at the issue has recognized the severity of the

problem, yet each has declined to act,[18] believing that they were "powerless" or that the solution more appropriately should come from someone else. As the Nation's highest court, this Court certainly is not powerless to rectify the problem, nor is there any more appropriate forum for dealing with it.

Punitive damages long ago reached the level of "overkill" in asbestos litigation. One recent ATLA-funded study reported that punitive damages have become much more frequent during the 1980's and 1990's. Rustad, at 23. Yet, if asbestos cases are *excluded* from the analysis, the number of punitive damages awards actually *fell* during the last six

---

[18] For other courts which have acknowledged the problem, but declined to resolve it, see Magallanes v. Superior Court, 213 Cal. Rptr. 547, 552 (Cal. Ct. App. 1985); and Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989).

years. Id. Indeed, more than one fourth of all punitive damages awarded in the last 25 years have been in asbestos cases. Id. at 26. Just between 1987 and 1990, more than *$300 million* in punitive damages has been awarded by juries in asbestos cases. Brickman, supra, note 198 at 1868.

Punitive damages help fuel the engine which, at this late stage of the asbestos litigation, continues to pump twice as many cases into the system as are resolved.[19] "The U.S. Justice Department has observed that punitive damages have become a legal lottery where many plaintiffs regularly file claims. Even though their probability of success

---

[19] The vast majority of these cases involve plaintiffs who are not even sick or impaired from asbestos. Forbes Magazine estimates that 65% to 80% of the claimants in asbestos suits currently pending in the legal system have no asbestos-related breathing impairment. Forbes, supra, at 76.

is small..., plaintiffs' lawyers recognize that if enough such claims are filed, they may eventually hit the jackpot[20]." Mahoney and Littlejohn, Innovation on Trial: Punitive Damages Verdicts vs. New Products, Science, December 15, 1989, at 1395, 1396. Surely, increasing the backlog of cases on hopelessly overcrowded dockets in jurisdictions across the country is not a societal goal which Haslip recognized.

---

[20] This same observation was made about asbestos litigation more than eight years ago: "The asbestos litigation often resembles the casinos sixty miles to the east of Philadelphia than a courtroom procedure." Blue v. Johns-Manville Corp., 10 Phila. 23, 36 (Phil. Ct. Comm. Pleas Oct. 12, 1983) aff'd 496 A.2d 848 (Pa. Sup. Ct. 1985).

Given the realities of the contingent fee system, some asbestos plaintiffs' lawyers don't need to wait until the jury returns a verdict to hit the jackpot. "[E]ffective hourly rates in asbestos cases often exceed $1,000; in some cases, the hourly rates of return are greater than $2,000 and can be as high as $5,000 per hour." A handful of them made $250-$350 million just in 1989 from the Manville Trust alone. A number of them are among the best paid lawyers in America from bringing in thousands of asbestos cases. Brickman, supra note 61 at 1834-35.

Finally, punitive damages claims in asbestos cases wreak havoc on attempts to achieve global settlement negotiations between plaintiffs and defendants. Judge William W. Schwarzer noted that "[b]arring successive punitive damage awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs." Schwarzer, Punishment Ad Absurdum, 11 Cal. Law. 116 (Oct. 1991). "In rejecting settlement offers, plaintiffs' lawyers sometimes state that because of the possibility of punitive damages, they would prefer to 'roll the dice.'" Brickman, supra note 202 at 1868.

The cumulative effect of multiple punitive damages awards on defendants in

asbestos litigation has been staggering. Otherwise healthy companies have been bankrupted; tens of thousands of jobs have been lost; and meanwhile, a few lawyers have become multi-millionaires. The imposition of punitive damages in this, or any other asbestos case, serves no legitimate societal goals, and hence, violates the fundamental fairness doctrine of the Fourteenth Amendment.

3. Additional Punitive Damages Awards Would Violate the Right of Defendants not to be Punished Repeatedly for the Same Conduct.

The cumulative *effect* of multiple punitive damages awards on defendants is not the only violation of their due process rights. Defendants have a right under the "fundamental fairness" doctrine of the Fourteenth Amendment not to be

punished repeatedly for the same course of conduct. Although this Court has held that a Fifth Amendment "double jeopardy" argument per se is not available to civil defendants, see, United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892 (1989), the Due Process Clause nonetheless provides defendants with the same protections afforded under the Fifth Amendment.

> A defendant has a due process right to be protected against unlimited multiple punishment for the same act. A defendant in a civil action has a right to be protected against double recoveries not because they violate "double jeopardy" but simply because overlapping damage awards violate that sense of "fundamental fairness" which lies at the heart of constitutional due process. Certainly the principle of res judicata, the notion that litigation must come to an end, that a party cannot sue or be sued repeatedly on the same cause of action, is part of the process that is due under our constitutional system.

In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887, 899 (N.D. Cal. 1981), vacated on other grounds, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983).

Thus, irrespective of the size of the awards in this case, the mere fact that Keene was assessed punitive damages twenty-one times in the same trial for the same course of conduct violates Keene's due process rights. As previously discussed, plaintiffs' claims in this case, or any case involving asbestos, were not based on the allegation that Keene engaged in reprehensible conduct directed toward any particular plaintiff in any particular case. Rather, plaintiffs allege that the general course of conduct of Keene's predecessors, *the same conduct in every*

case, supports the imposition of punitive damages.[21] Thus, Keene has been repeatedly put at risk, and repeatedly punished, for the same conduct. The "fundamental fairness" doctrine of the Due Process Clause prohibits this practice.

---

[21] Indeed, this broad brush approach paints, not only across different cases, but across different defendants. In these cases, as in many other jurisdictions, punitive damages evidence as to one defendant is introduced as to all other defendants. The intra-company documents introduced by plaintiffs in an attempt to prove the punitive culpability of Owens-Corning Fiberglas Corp. were admitted as to *all* defendants, even though there was no allegation that the other defendants had ever seen those documents. Trial tr. 10/18/90 Vol. II at p.110, L.20 to p.113, L.7. As Judge Starcher put it, the documents demonstrated "how you folks *could have* developed a strategy on these issues because one company did." Id. at p.112, L.11 to L.13. Thus, plaintiffs' punitive damages claims not only were not plaintiff-specific, they were not even defendant-specific.

II.

THE FAILURE OF THE TRIAL COURT AND THE SUPREME COURT OF APPEALS OF WEST VIRGINIA TO EVALUATE THE PUNITIVE DAMAGES VERDICTS, IN ACCORDANCE WITH THIS COURT'S RULING IN PACIFIC MUTUAL LIFE INSURANCE CO. V. HASLIP, VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

If this Court declines to declare that the punitive damages verdicts in these, and all asbestos cases, violate the substantive due process protections enunciated in Haslip, then the Court *must* recognize that the procedural protections of Haslip were blatantly ignored in these cases by a court which, in another case six months earlier, applied Haslip's mandate almost verbatim. At a minimum, these cases must be remanded for reconsideration in light of this Court's ruling in Haslip.

In Haslip, the Court upheld the procedural protections implemented by the

Alabama Supreme Court. 111 S.Ct. at 1044-46. In Alabama, the trial court is required first to determine whether the punitive damages award is constitutionally excessive and must place on the record detailed reasons for its interference, or failure to interfere, with the jury's verdict on the grounds of excessiveness. Id. at 1044. On appeal, a similar analysis is required to determine whether the punitive damages award "'exceed[s] an amount that will accomplish society's goals of punishment and deterrence.'" Id. at 1045 (quoting Green Oil Co. v. Hornsby, 539 So.2d 218, 222 (Ala. 1989)). These procedures, the Haslip Court ruled, provide the "additional check" on the jury's and trial court's discretion required by the "fundamental fairness" doctrine of the

Due Process Clause. Haslip, 111 S.Ct. at 1045.

Haslip articulated at least nine factors to be considered in determining the propriety of a punitive damages verdict: (1) the impact of a punitive damage award on innocent third parties; (2) the degree of reprehensibility of the defendant's conduct; (3) the duration of that conduct; (4) the defendant's awareness of the conduct; (5) any concealment; (6) the existence and frequency of similar past conduct; (7) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant sustain a loss; (8) the financial position of the defendant; and (9) the existence of other civil awards against the defendant for the same conduct. Haslip, 111 S.Ct. at 1044-1045.

As this Court specifically recognized, the pre-Haslip West Virginia scheme under which punitive damages were reviewed (or more accurately, not reviewed) in these cases does not pass constitutional muster. Prior to Haslip, a West Virginia jury was allowed to award punitive damages against a defendant if it found simply that "'the defendant... acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations....'" Wells v. Smith, 297 S.E.2d 872, 877 (W. Va. 1982) (citing, Mayer v. Frobe, 22 S.E. 58 (1895)). Reviewing courts were cautioned that "the degree of punishment to be inflicted on the wrongdoer is peculiarly within the province of the jury," Wells, 297 S.E.2d at 880, and were permitted to overturn a jury's punitive damages

verdict only if "the award of punitive damages has no foundation in the evidence so as to evince passion, prejudice or corruption in the jury...." Id.

Shortly after its decision in Haslip, this Court found the West Virginia punitive damages scheme to be constitutionally deficient and on June 28, 1991, granted a petition for writ of certiorari to the Supreme Court of Appeals of West Virginia in the case of Fleming Landfill, Inc. v. Garnes, 111 S. Ct. 2882 (1991). This Court vacated the judgment in Fleming Landfill, which included an award of punitive damages, and remanded the case to the Supreme Court of Appeals of West Virginia for further consideration in light of the Haslip decision. Id.

Declaring Haslip to be "a major step in the unification of America's

decisional law", the Supreme Court of Appeals for West Virginia, on remand, invalidated the then-existing West Virginia punitive damages scheme and established new criteria consistent the Haslip mandate. Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 905, 908 (W. Va. 1991). Specifically and significantly, the Garnes court held that the vague criteria for post trial review set forth in Wells v. Smith - and ostensibly applied in these cases - "provide insufficient review by the trial court of punitive damages awards." Id. at 908.

The Garnes court directed that, upon remand, the trial court was to "carefully explain [to the jury] the factors to be considered in awarding punitive damages." Id. at 908-9. The court then listed the factors which must be considered by a

jury under Haslip to ensure that a defendant's due process rights are upheld: the reprehensibility of the defendant's conduct; the duration of the conduct; awareness of the potential harm caused by the conduct; any attempt to conceal the conduct; any similar past conduct; the profit, if any, from the conduct; and the financial position of the defendant. Id. The court also ruled that the punitive damages must bear some reasonable relationship to the harm caused and to the compensatory damages awarded. Id.

The Garnes court further held that the trial court and appellate court, on review, must consider certain additional factors under Haslip: the cost of the litigation; any criminal sanctions imposed on defendants; any other civil actions against the same defendant based

on the same course of conduct; and the appropriateness of the verdict to encourage fair and reasonable settlements. Id. For the post-trial review to be meaningful at the appellate level, the Garnes court required the trial court to "thoroughly set out the reasons for changing (or not changing) the award." Id. at 910.

The Garnes court correctly held that the West Virginia standard which governed punitive damages claims at the time of the verdicts in these cases was so deficient as to violate the "fundamental fairness" requirement of the Due Process Clause. Indeed, the facts of this case provide no better example of the accuracy of the Garnes court's holding. At the trials of the Adams and Barnes groups, the two juries considered literally the identical evidence on punitive damages,

yet one jury assessed punitive damages against Keene under the West Virginia standard, while the other concluded that the same evidence was insufficient to support a claim for punitive damages under the same standard![22]

In a clear abuse of its discretionary power, the Supreme Court of Appeals of West Virginia inexplicably rejected defendants' petitions for appeal. It did so in spite of this Court's ruling in Haslip; in spite of the decision vacating and remanding the judgment in Fleming Landfill; in spite of the Garnes court's recognition that the

---

[22] One cannot argue that the differences between the verdicts was a product of the juries' consideration of the extent of harm inflicted. The jury in these cases awarded $5,000 in every single case, irrespective of the injury to the particular plaintiff. The compensatory verdicts ranged from $15,000 to $299,200, while the punitive damages verdicts steadfastly remained at $5,000 per plaintiff. Likewise, the Barnes jury found that punitive damages were not warranted, again irrespective of a plaintiff's injury or the compensatory damages awarded in a given case.

former West Virginia punitive damages scheme violated defendants' due process rights; and in spite of the obvious inadequacies of standards which allowed one jury to award punitive damages while another jury, hearing the identical evidence, refused to award punitive damages.

This Court and the Supreme Court of Appeals for West Virginia have ruled that the former West Virginia punitive damages scheme provided insufficient jury guidelines and post-trial review. Fleming Landfill, 111 S. Ct. 2882; Garnes, 413 S.E.2d at 905. The punitive damages verdicts in these cases were rendered under that unconstitutional scheme. The jury did not consider *any* evidence of the type required by Haslip, nor is there any indication that either the trial court or the Supreme Court of

Appeals evaluated the factors which Haslip held were necessary to protect defendants' due process rights.[23] There is no explanation, and no excuse, for the West Virginia Supreme Court of Appeals' arbitrary refusal to vacate the judgments and remand the cases to the trial court for reconsideration in light of the Haslip and Garnes opinions.

---

[23] The procedural protections established by Haslip to safeguard defendants' rights in punitive damages proceedings were ignored in these cases. This is hardly surprising, since they are almost universally ignored in dealing with the problem of multiple punitive damages awards in asbestos litigation nationwide. There simply is no uniform system in place for reviewing total punitive damage awards in asbestos actions nationwide to insure that these awards will not exceed the limits imposed by due process, either singly or cumulatively. Without these procedural protections to assure that multiple punitive damages awards do not exceed the amount necessary to accomplish the goals of punishment and deterrence, any further award of punitive damages in this or any asbestos case would prima facie violate the Due Process Clause.

But, even if the *procedural* guidelines mandated by Haslip somehow were implemented on a national scale, further punitive damages awards would violate the *substantive* proscriptions of Haslip, since additional punitive awards will do nothing to further the societal goals of punishment and deterrence.

Had the Supreme Court of Appeals followed its own direction and remanded these cases for constitutionally appropriate review of the punitive damages verdicts, the trial court would have discovered that any further award of punitive damages against Keene would violate the Due Process Clause of the Fourteenth Amendment. Neither the societal goal of punishment nor deterrence would be advanced by punitive damages awards against Keene. None of the factors which the Haslip court found must be considered on this issue support an award of punitive damages.

For example, the "impact on innocent third parties" of each punitive damages award is sharply felt by Keene. Due to the tremendous number of asbestos cases pending against it, the threat of bankruptcy is very real. If Keene must

pay punitive damages verdicts to plaintiffs who already have been fully compensated, thousands of existing and future claimants against Keene may well receive no financial compensation for their injuries. In addition, if Keene were forced into bankruptcy, the real impact would be felt by the employees of Keene's operating division (loss of their jobs), its shareholders and its customers, including the United States Government, which purchases parts from Keene's operating division for use in the Patriot Missile program.

There is no "reprehensibility" in *Keene's* conduct. Keene has never done anything that was or is illegal. For four years, a Keene subsidiary sold a few insulation products which contained small amounts of asbestos, supplied by others, to meet customer specifications,

including those of the United States Government. On this evidence, the Barnes jury found, as have dozens of other juries, that there is no proof to support a punitive damages verdict against Keene. Nevertheless, to date, Keene has spent fifty times the purchase price of BEH in indemnification of asbestos-related claims and legal fees, and has pledged 80% of its remaining assets to compensate persons with asbestos-related injuries from exposure to BEH's thermal insulation products.

Another factor which courts must consider is the duration of the defendant's conduct. Keene's association with an asbestos-containing product spanned only four years, yet Keene, has been defending itself against more than 150,000 past or present punitive damages claims for more than a decade.

Keene did not engage in any "similar past conduct". Keene was founded only twenty-five years ago and neither it nor BEH was ever involved in any similar product liability problem.

Courts are required to consider the "profitability to the defendant of the wrongful conduct." Yet, the BEH division was *unprofitable* during the years in which it was owned by Keene.

Courts also must consider the existence of other civil awards against the defendant for the same conduct. In the case of Keene, through June 30, 1992, Keene had already been sued more than 156,000 times in asbestos cases. The company already has been forced to spend nearly $400 million on asbestos-related litigation. Keene has been subject to outstanding compensatory verdicts totalling approximately $70 million, of

which approximately $13 million is punitive damages for the identical course of conduct - BEH's production of asbestos insulation.

Finally, the dire "financial position" of Keene may be the strongest argument against further punitive damages awards. Keene's 1991 sales totaled less than $10 million, but it spends more than $800,000 *each week* to resolve litigation. Although Keene has disposed of 78,000 lawsuits to date, it remains a defendant in approximately 87,000 asbestos cases nationwide. In July, 1990, Keene offered approximately 80% of its remaining net worth to resolve the remaining asbestos lawsuits. By June 30, 1992, Keene's net worth was approximately $134 million with an estimated $58 million additional in available insurance coverage for its asbestos liabilities. This represents an

average of slightly more than $2,000 for each existing asbestos claimant. Moreover, this estimate of available resources for the average claimant does not account for the additional 2,000 asbestos claims being filed against Keene per month, nor for Keene's expenses and legal fees in defending the thousands of cases brought by unimpaired plaintiffs. This enormous future liability poses a very serious problem, made significantly worse by punitive damages.

Inasmuch as the jury in these cases awarded punitive damages under standards already declared unconstitutional, and the reviewing court's refusal to consider the verdicts under the standards mandated by Haslip, the jury's verdicts on punitive damages cannot stand. This Court should vacate the judgments and rule that further punitive awards in

asbestos cases is unwarranted and unconstitutional or, at a minimum, remand these cases for consideration in light of Haslip.

CONCLUSION

Pacific Mut. Life Ins. Co. v. Haslip requires that any award of punitive damages be assessed through a rational and systematic decision-making process. 111 S. Ct. 1032. The lack of such a rational and systematic decision making process in this case, and nationwide, to control the totality of punitive damages and ensure "meaningful individualized assessment of appropriate deterrence and retribution" results in repetitive punitive damage awards which violate defendants' constitutional rights.

The imposition of additional punitive damages awards in these or any other asbestos cases advances no legitimate societal goals. Thus, any such award of punitive damages would violate the Due Process Clause.

For the foregoing reasons, Keene Corporation's petition should be granted.

Respectfully submitted,

Andrew T. Berry
Counsel of Record
Gita F. Rothschild
McCarter & English
Four Gateway Center
100 Mulberry Street
Newark, N.J. 07102
(201) 622-4444
Attorneys for Petitioner, Keene Corporation

Of Counsel:

Stuart E. Rickerson
Vice-President -
General Counsel
Keene Corporation
200 Park Avenue
New York, N.Y. 10166
(212) 557-1900

DATED: August 11, 1992

92-359

No. _____

FILED
AUG 11 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

—v.—

LEONARD ADAMS, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

Of Counsel:

STUART E. RICKERSON
Vice President–
General Counsel
Keene Corporation
200 Park Avenue
New York, New York 10166
(212) 557-1900

ANDREW T. BERRY
Counsel of Record
GITA F. ROTHSCHILD
McCARTER & ENGLISH
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(201) 622-4444

Attorneys for Petitioner, Keene Corporation

TABLE OF CONTENTS

Page

U.S. Const. amend. XIV, § 1.....A-1

Judgment Orders of the Circuit Court of Monongalia County West Virginia Denying Defendants' Post-Trial Motions and Entering Judgment in Favor of Plaintiffs, Dated March 11, 1992.....A-2 to A-100

Judgment Order pertaining to plaintiff Leonard Adams.....A-2

Judgment Order pertaining to plaintiff Garlen R. Burton.....A-7

Judgment Order pertaining to plaintiff George R. Campbell.....A-12

Judgment Order pertaining to plaintiff Leslie B. Carr.....A-18

Judgment Order pertaining to plaintiff Arville Dalton.....A-24

Judgment Order pertaining to plaintiff James R. Darrah.....A-29

Judgment Order pertaining to plaintiff Paul Dunn.....A-35

Judgment Order pertaining to plaintiff William M. Gabbert.....A-40

Judgment Order pertaining to plaintiff George F. Hoschar.....A-46

Judgment Order pertaining to plaintiff James R. Kirk.....A-53

Judgment Order pertaining to plaintiff William E. Kittle.....A-59

Judgment Order pertaining to plaintiff Foster A. Lipscomb.....A-65

Judgment Order pertaining to plaintiff Nelson E. Lott.....A-70

Judgment Order pertaining to plaintiff George V. Mehalic.....A-77

Judgment Order pertaining to plaintiff Jeryl C. Root.....A-83

Judgment Order pertaining to plaintiff Stanley E. Rowe.....A-90

Judgment Order pertaining to plaintiff Joseph L. Seberna.....A-95

Order of the Supreme Court of Appeals for the State of West Virginia Refusing Defendants' Petition for Appeal, Dated May 13, 1992.....A-101

Defendants' Motion to Strike PunitiveDamages.....A-103

Defendants' Memorandum in Support of Motion to Strike Punitive Damages.....A-105

United States Constitution, amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

LEONARD ADAMS

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Thirty-Two Thousand Five Hundred Dollars ($32,500.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendants Keene Corporation and Owens-Corning Fiberglas shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages and the Defendant Keene Corporation is ordered to pay the plaintiff the sum of Five

Thousand Dollars ($5,000.00) in punitive and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty Thousand Dollars ($30,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

GARLEN R. BURTON, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Twenty-Nine Thousand Five Hundred Dollars ($29,500.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendants Keene Corporation and Owens-Corning Fiberglas shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages and the Defendant Keene Corporation is ordered to pay the plaintiff the sum of Five

Thousand Dollars ($5,000.00) in punitive and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty Thousand Dollars ($30,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

GEORGE R. CAMPBELL, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff George Campbell's compensatory damages were determined by the Jury to be Fifty-One Thousand Dollars ($15,000.00). The Court does hereby further find that the Plaintiff George Campbell had negotiated settlements in his case totalling Thirty-Nine Thousand Seventy-Five Dollars ($39,075.00) prior to said verdict. The Court does in addition find that One Thousand Seven Hundred Twenty-Five Dollars ($1,725.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court dies hereby HOLD and ORDER that the appropriate amount of set-offs from the

Fifty-One Thousand Dollars ($51,000.00) compensatory verdict shall be Thirty-Seven Thousand Three Hundred Fifty Dollars ($37,350.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Thirteen Thousand Six Hundred Fifty Dollars ($13,650.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the

Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Forty-Three Thousand Six Hundred Fifty Dollars ($43,650.00) prior to perfecting any appeal in this matter, plus an additional amount of $4,400.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in

the sum of Eighteen Thousand Six Hundred Fifty Dollars ($18,650.00) prior to perfecting any appeal in this matter, plus an additional amount of $1,900.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease

and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

LESLIE B. CARR, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff Leslie B. Carr's compensatory damages were determined by the Jury to be Twenty-Eight Thousand Five Hundred Dollars ($28,500.00). The Court does hereby further find that the Plaintiff Leslie B. Carr had negotiated settlements in his case totalling Twenty-Eight Thousand Seventy-Five Dollars ($28,075.00) prior to said verdict. The Court does in addition find that One Thousand Seven Hundred Twenty-Five Dollars ($1,725.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the

Thirty-Eight Thousand Five Hundred Dollars ($38,500.00) compensatory verdict shall be Twenty-Eight Thousand Five Hundred Fifty Dollars ($28,500.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Two Thousand One Hundred Fifty Dollars ($2,150.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas

Corporation is ordered to pay the Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty-Two Thousand One Hundred Fifty Dollars ($32,150.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,300.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Seven Thousand One Hundred Fifty Dollars ($7,150.00.00) prior to perfecting any appeal in this matter, plus an additional amount of $7,200.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict dies not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies

constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

ARVILLE DALTON, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Twenty Thousand Dollars ($20,000.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendants Keene Corporation and Owens-Corning Fiberglas shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages and the Defendant Keene Corporation is ordered to pay the plaintiff the sum of Five Thousand Dollars ($5,000.00) in punitive

and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty Thousand Dollars ($30,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,000.00 Dollars.

Keene Corporation is hereby ORDERED to forth with obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 Dollars.

This Court previously having ruled that the cases listed herein did

not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-831

JAMES R. DARRAH, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff James R. Darrah's compensatory damages were determined by the Jury to be Fifty-Nine Thousand Five Hundred Dollars ($59,500.00). The Court does hereby further find that the Plaintiff James Darrah had negotiated settlements in his case totalling Thirty-Eight Thousand Five Hundred Fifty Dollars ($38,550.00) prior to said verdict. The Court does in addition find that Three Thousand Six Hundred Dollars ($3,600.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court dies hereby HOLD and ORDER that the appropriate amount of set-offs from the

Fifty-Nine Thousand Five Hundred Dollars ($59,500.00) compensatory verdict shall be Thirty-Four Thousand Nine Hundred Fifty Dollars ($34,950.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Twenty-Four Thousand Five Hundred Fifty Dollars ($24,550.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the

Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Fifty-Four Thousand Five Hundred Fifty Dollars ($54,550.00) prior to perfecting any appeal in this matter, plus an additional amount of $5,500.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in

the sum of Twenty-Nine Thousand Five Hundred Fifty Dollars ($29,550.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,000.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease

and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

PAUL DUNN, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Thirty Thousand Seven Hundred Fifty Dollars ($30,750.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendants Keene Corporation and Owens-Corning Fiberglas shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages and the Defendant Keene Corporation is ordered to pay the plaintiff the sum of Five

Thousand Dollars ($5,000.00) in punitive and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty Thousand Dollars ($30,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

WILLIAM M. GABBERT,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff William M. Gabbert's compensatory damages were determined by the Jury to be Thirty-Eight Thousand Dollars ($38,000.00). The Court does hereby further find that the Plaintiff William M. Gabbert had negotiated settlements in his case totalling Thirty-One Thousand Two Hundred Twenty-Five Dollars ($31,225.00) prior to said verdict. The Court does in addition find that Two Thousand Eight Hundred Seventy-Five Dollars ($2,875.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the

appropriate amount of set-offs from the Thirty-Eight Thousand Dollars ($38,000.00) compensatory verdict shall be Twenty-Eight Thousand Three Hundred Fifty Dollars ($28,350.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Nine Thousand Six Hundred Fifty Dollars ($9,650.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas

Corporation is ordered to pay the Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty-Nine Thousand Six Hundred Fifty Dollars ($39,650.00) prior to perfecting any appeal in this matter, plus an additional amount of $4,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Fourteen Thousand Six Hundred Fifty Dollars ($14,650.00) prior to perfecting any appeal in this matter, plus an additional amount of $1,500.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies

constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

GEORGE F. HOSCHAR, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff George Hoschar's compensatory damages were determined by the Jury to be One Hundred Seventy-Eight Thousand Nine Hundred Ninety Dollars ($178,990.00). The Court does hereby further find that the Plaintiff George Hoschar had negotiated settlements in his case totalling Seventy-Three Thousand Hundred Dollars ($73,300.00) prior to said verdict. The Court does in addition find that Four Thousand Eight Hundred Dollars ($4,800.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the

appropriate amount of set-offs from the One Hundred Seventy-Eight Thousand Nine Hundred Ninety Dollars ($178,990.00) compensatory verdict shall be Sixty-Eight Thousand Five Hundred Dollars ($68,500.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of One Hundred Ten Thousand Four Hundred Ninety Dollars ($110,490.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the

Defendant Owens-Corning Fiberglas Corporation is ordered to pay the Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of One Hundred Forty Thousand Four Hundred Ninety Dollars ($140,490.00) prior to perfecting any appeal in this matter,

plus an additional amount of $15,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of One Hundred Fifteen Thousand Four Hundred Ninety Dollars ($115,490.00) prior to perfecting any appeal in this matter, plus an additional amount of $11,500.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy.

The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

JAMES R. KIRK, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff James R. Kirk's compensatory damages were determined by the Jury to be Twenty-Nine Thousand Dollars ($29,000.00). The Court does hereby further find that the Plaintiff James R. Kirk had negotiated settlements in his case totalling Twenty-Seven Thousand Twenty-Five Dollars ($27,025.00) prior to said verdict. The Court does in addition find that One Thousand Seven Hundred Twenty-Five Dollars ($1,725.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the

Twenty-Nine Thousand Hundred Dollars ($29,000.00) compensatory verdict shall be Twenty-Five Thousand Three Hundred Dollars ($25,300.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Three Thousand Seven Hundred Dollars ($3,700.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the

Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty-Three Thousand Seven Hundred Dollars ($33,700.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,400.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in

the sum of Eight Thousand Seven Hundred Dollars ($8,700.00) prior to perfecting any appeal in this matter, plus an additional amount of $900.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease

and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning
Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

WILLIAM E. KITTLE, et al.,

Plaintiff,

v.
CIVIL ACTION NO.: 86-C-830

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff William E. Kittle's compensatory damages were determined by the Jury to be Fifty-Six Thousand Dollars ($56,000.00). The Court does hereby further find that the Plaintiff William E. Kittle had negotiated settlements in his case totalling Twenty-Four Thousand Eight Hundred Twenty-Five Dollars ($24,825.00) prior to said verdict. The Court does in addition find that One Thousand Seven Hundred Twenty-Five Dollars ($1,725.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the

Fifty-Six Thousand Dollars ($56,000.00) compensatory verdict shall be Twenty-Three Thousand One Hundred Dollars ($23,100.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Thirty-Two Thousand Nine Hundred Dollars ($32,900.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the

Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Sixty-Two Thousand Nine Hundred Dollars ($62,900.00) prior to perfecting any appeal in this matter, plus an additional amount of $6,300.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in

the sum of Thirty-Seven Thousand Nine Hundred Dollars ($37,900.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,800.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease

and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-833

FOSTER A. LIPSCOMB, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Thirty-Five Thousand Five Hundred Dollars ($35,500.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendants Keene Corporation and Owens-Corning Fiberglas shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages and the Defendant Keene Corporation is ordered to pay the plaintiff the sum of Five

Thousand Dollars ($5,000.00) in punitive and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty Thousand Dollars ($30,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-763

NELSON E. LOTT , et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff Nelson E. Lott's compensatory damages were determined by the Jury to be Seventy-Eight Thousand Six Hundred Dollars ($78,600.00). The Court does hereby further find that the Plaintiff Nelson E. Lott had negotiated settlements in his case totalling Thirty-Seven Thousand Twenty Hundred Dollars ($37,200.00) prior to said verdict. The Court does in addition find that Three Thousand Three Hundred Dollars ($3,300.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court dies hereby HOLD and ORDER that the appropriate amount of set-offs from the

Seventy-Eight Thousand Six Hundred Dollars ($78,600.00) compensatory verdict shall be Thirty-Three Thousand Nine Hundred Dollars ($33,900.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Forty-Four Thousand Seven Hundred Dollars ($44,700.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas

Corporation is ordered to pay the Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Seventy-Four Thousand Seven Hundred Dollars ($74,700.00) prior to perfecting any appeal in this matter, plus an additional amount of $7,500.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Forty-Nine Thousand Seven Hundred Dollars ($49,700.00) prior to perfecting any appeal in this matter, plus an additional amount of $5,000.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict dies not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies

constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 87-C-7

GEORGE V. MEHALIC, JR. et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff George V. Mehalic's compensatory damages were determined by the Jury to be Thirty-Nine Thousand Dollars ($39,000.00). The Court does hereby further find that the Plaintiff George V. Mehalic had negotiated settlements in his case totalling Twenty-Six Thousand One Hundred Twenty-Five Dollars ($26,175.00) prior to said verdict. The Court does in addition find that One Thousand Seven Hundred Twenty-Five Dollars ($1,725.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court dies hereby HOLD and ORDER that the appropriate amount of set-offs from the

Thirty-Nine Thousand Dollars ($39,000.00) compensatory verdict shall be Twenty-Four Thousand Four Hundred Fifty Dollars ($24,450.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the

legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Forty-Four Thousand Five Hundred Fifty Dollars ($44,550.00) prior to perfecting any appeal in this matter, plus an additional amount of $4,500.00 Dollars.

Keene Corporation is hereby ORDERED to forth with obtain a bond in the sum of Nineteen Thousand Five Hundred Fifty Dollars ($19,550.00) prior to perfecting any appeal in this matter, plus an additional amount of $2,000.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural

disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ iilegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-763

JERYL C. ROOT, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff Jeryl C. Root's compensatory damages were determined by the Jury to be Thirty-Eight Thousand Five Hundred Dollars ($38,500.00). The Court does hereby further find that the Plaintiff Jeryl C. Root had negotiated settlements in his case totalling Thirty-One Thousand Four Hundred Seventy-Five Dollars ($31,475.00) prior to said verdict. The Court does in addition find that One Thousand Seven Hundred Twenty-Five Dollars ($1,725.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court dies hereby HOLD and ORDER that the

appropriate amount of set-offs from the Thirty-Eight Thousand Five Hundred Dollars ($38,500.00) compensatory verdict shall be Twenty-Nine Thousand Seven Hundred Fifty Dollars ($29,750.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Eight Thousand Seven Hundred Fifty Dollars ($8,750.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the

Defendant Owens-Corning Fiberglas Corporation is ordered to pay the Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty-Eight Thousand Seven Hundred Fifty Dollars ($38,750.00) prior to perfecting any appeal in this matter,

plus an additional amount of $4,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirteen Thousand Seven Hundred Fifty Dollars ($13,750.00) prior to perfecting any appeal in this matter, plus an additional amount of $1,400.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict dies not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy.

The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-782

STANLEY E. ROWE, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Fifteen Thousand Five Hundred Dollars ($15, 000.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendants Keene Corporation and Owens-Corning Fiberglas shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages and the Defendant Keene Corporation is ordered to pay the plaintiff the sum of Five

Thousand Dollars ($5,000.00) in punitive and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty Thousand Dollars ($30,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/illegible
Counsel for Plaintiff

Counsel for Owens-Corning
Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-832

JOSEPH L. SEBERNA, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff Joseph L. Sberna's compensatory damages were determined by the Jury to be Thirty-Seven Thousand Dollars ($37,000.00). The Court does hereby further find that the Plaintiff Joseph L. Sberna had negotiated settlements in his case totalling Twenty-Eight Thousand Five Hundred Twenty-Five Dollars ($28,525.00) prior to said verdict. The Court does in addition find that One Thousand Seven Hundred Twenty-Five Dollars ($1,725.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the

Thirty-Seven Thousand Dollars ($37,000.00) compensatory verdict shall be Twenty-Six Thousand Eight Hundred Dollars ($26,800.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the

legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Forty Thousand Two Hundred Dollars ($40,200.00) prior to perfecting any appeal in this matter, plus an additional amount of $4,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Fifteen Thousand Two Hundred Dollars ($15,200.00) prior to perfecting any appeal in this matter, plus an additional amount of $1,500.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis,

including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th day of May, 1992, the following order was made and entered:

Leonard Adams, et al., Plaintiff Below, Respondents

vs.) No. 912484

Keene Corporation, et al., Defendants Below

Keene Corporation, Defendant Below, Petitioner

On a former day, to-wit, September 18, 1991, came the petitioner, Keene Corporation, by Spilman, Thomas, Battle & Klostermeyer, David K. Hendrickson and R. Scott Long, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Monongalia County, rendered on the 11th day of March, 1991, with the record therein accompanying the petition.

Thereafter, on the 23rd day of January, 1992, came the respondents by Hostler & Segal, and Scott S. Segal, and Henderson & Goldberg, and Theodore Goldberg, their attorneys, and presented to the Court their written response in opposition thereto. Finally, on the 27th day of February, 1992, came the respondents by Hostler & Segal, and Scott S. Segal, and Henderson & Goldberg, and Theodore Goldberg, their attorneys, and presented to the Court their written supplemental response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

Justice Brotherton would grant.

A True Copy

Attest: /s/ illegible

Clerk, Supreme Court of Appeals

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

IN RE: PERSONAL INJURY ASBESTOS CASES
(October 15, 1990 Trial Group)

CIVIL ACTION NO. 86-C-764

LEONARD ADAMS, et al.,

Plaintiffs,

v.

ARMSTRONG WORLD INDUSTRIES,
a Pennsylvania Corporation,
et al.,

Defendants.

MOTION TO STRIKE PUNITIVE DAMAGES

Now come the defendants, Owens-Illinois, Inc., Pittsburgh Corning Corporation, Fibreboard Corporation and Keene Corporation, by and through counsel, and would move for the Court to strike the issue of punitive damages from this trial due to the following reason:

1. The imposition of punitive damages in the context of a mass tort litigation subjects the petitioner to a multiple punitive damage award for the same conduct and constitutes an excessive fine in violation of the Fifth and Eighth Amendments to the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

Therefore, these defendants would move for the Court to strike the issue of punitive damages from this trial.

OWENS-ILLINOIS, INC.,
PITTSBURGH CORNING CORPORATION
FIBREBOARD CORPORATION AND
KEENE CORPORATION

By SPILMAN, THOMAS, BATTLE
& KLOSTERMEYER

/s/ illegible
David K. Hendrickson
Eric M. James
Post Office Box 273
Charleston, West Virginia 25321

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

IN RE: PERSONAL INJURY ASBESTOS CASES
(October 15,1990 Trial Group)

CIVIL ACTION NO. 86-C-764 et seq.

LEONARD ADAMS, et al.,

Plaintiffs,

v.

ARMSTRONG WORLD INDUSTRIES,
a Pennsylvania Corporation,
et al.,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION
TO STRIKE PUNITIVE DAMAGES

ARGUMENT

I. INTRODUCTION

II. PUNITIVE DAMAGES SHOULD NOT BE ALLOWED IN MULTI- PLAINTIFFS PRODUCTS LIABILITY LITIGATION.

III. AWARDS OF PUNITIVE DAMAGES IN A MULTITUDE OF SIMILAR SUITS FOR A SINGLE ACT SUBJECTS THE DEFENDANT TO DOUBLE JEOPARDY.

IV. THE STANDARD FOR AWARDING PUNITIVE DAMAGE IS SO VAGUE AS TO DENY DEFENDANTS' RIGHT TO DUE PROCESS.

V. REPETITIVE PUNITIVE DAMAGE AWARDS THROUGHOUT THE COUNTRY AMOUNT TO UNCONSTITUTIONALLY "EXCESSIVE FINES" IN VIOLATION OF THE EIGHTH AMENDMENT.

VI. THE DEFENDANTS' DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE 3, SECTION 10 AND SECTION 17 OF THE WEST VIRGINIA CONSTITUTION ARE VIOLATED BY PERMITTING MULTIPLE PUNITIVE DAMAGE VERDICTS AND BY REQUIRING A SEPARATE LIABILITY JURY TO ASSESS A MULTIPLIER-WITHOUT ALL THE EVIDENCE, WITHOUT ANY GUIDELINE AS TO WHAT A FAIR MULTIPLIER MIGHT BE.

VII. CONCLUSION.

I.

ARGUMENT

The above-captioned action contains claims for damages for personal injuries allegedly caused by the acts and/or omissions of defendants with regard to the manufacture and distribution of asbestos-containing products. Plaintiffs also claim entitlement to punitive damages. The defendants maintain that the plaintiffs' claim for punitive damages should be dismissed in accordance with public policy and the United States Constitution.

In the last decade the American Judicial System has encountered an unprecedented proliferation of asbestos product liability litigation. More than 40,000 claimants have already filed personal injury suits and 1000 additional suits are filed each month.

Kakalik, Ebener, Felsteiner, Haggestrom & Shanley, Costs of Asbestos Litigation, 12 (Institute for Civil Justice, Rand Corp. 1984). Not to mention the staggering property damage lawsuits being filed each day against the same defendants. It is unquestionably the most extensive and expensive litigation in history. The number of American workers who have developed or will develop diseases related to their exposure to asbestos is of unprecedented proportion with no end in sight.

Aside from seeking compensatory awards, the multitude of individual plaintiffs look for punitive damages. The enduring nature of this litigation into the foreseeable future raises constitution issues unique to the asbestos litigation. The time is ripe for reasserting the case against

punitive damages in the asbestos litigation. The defendants assert that punitive damages are inconsistent with the policy goals of strict liability; in addition, the defendants submit that continued awards of punitive damages on this extensive scale is in violation of the U.S. Constitution in the following ways. Punitive damage claims in this litigation have raised the spectre (sic) of repeated and excessive punitive damage awards for a single course of tortuous conduct in violation of the 5th Amendment double jeopardy clause. In addition, the standard for awarding punitive damages in most jurisdictions is so vague as to deny defendants right to due process in violation of the 14th Amendment. Moreover, repetitive punitive damage awards for a single course of conduct may amount to an

unconstitutionally excessive fine in violation of the Eighth Amendment.

II. PUNITIVE DAMAGES ARE NOT APPROPRIATE IN MULTI-PLAINTIFF PRODUCTS LIABILITY LITIGATION.

A. Public Policy Dictates a Dismissal of the Punitive Damages Claim.

The law of punitive damages evolved as a mechanism for civil punishment and deterrence: Traditionally, punitive damages were assessed against individuals who had committed an intentional tort or engaged in criminal behavior. Generally, punitive damages were a one time award for a one time violation. Within the last decade courts have been permitting imposition of punitive damages against sellers of defective products where the underlying claim for compensatory damages is negligence or strict liability. Many

commentators have argued and courts have agreed that the punitive damage awards are incompatible with strict liability claims because the former is solely concerned with the conduct of the defendant while the latter focuses on the condition of the product regardless of fault. See Meyers & Bairus, Punitive Damages in Product Liability Cases: A Survey, 51 Ins. Couns. J. 212, 213-16 (1984).

The first major attack on punitive damage claims in multiple product liability cases came from Judge Friendly of the Second Circuit in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, (1967) (the first appellate opinion to arise out of the anti-cholesterol drug sold under the trade name MER/29). Judge Friendly offered powerful policy arguments against awarding punitive

damages against manufacturers in product liability cases. In Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2nd Cir. 1967), Judge Friendly articulated the dangers of uncontrolled punitive recoveries in the hundreds of suits pending in different jurisdictions against the manufacturer of MER/29, stating:

> If all recovered punitive damages in the amount here awarded these would run into tens of millions, as contrasted with the maximum criminal penalty of "imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine", 21 U.S.C. § 333(b), for each violation of the Food, Drug and Cosmetic Act with intent to defraud or mislead. We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill. 378 F.2d at 839. (Emphasis added, footnote omitted.)

Judge Friendly also observed that multiple awards eventually jeopardize a

manufacturer's very existence, the ultimate penalty falling on the innocent stockholders of the defendant corporation, the employees, the general public in the form of higher consumer prices.

As stated in Roginsky:

> [T]he apparent impracticality of imposing an effective ceiling on punitive awards in hundreds of suits in different courts may result in an aggregate which, when piled on large compensatory damages, could reach catastrophic amounts. If liability policies can protect against this risk as several courts have held, the cost of providing this probably needless deterrence, not only to the few manufacturers from whom punitive damages for highly negligent conduct are sought but to the thousands from whom it never will be, is passed on to the consuming pubic; if they cannot, as is held by other courts and recommended by most commentators, a sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their

> investment for a single management sin. Id. at 841.

Judge Friendly's analysis has received widespread support in the asbestos litigation and several courts have dismissed punitive damage claims on the grounds that they are inappropriate in multiple-plaintiff product liability actions.

The Federal Court in Connecticut dismissed punitive damage claims relying on Judge Friendly's decision in Roginsky, supra. In his ruling in LaBrecque v. Johns-Manville, transcript at 2356-2362 (1982), Judge Blumenfeld echoed Judge Friendly's views.

> "I don't think that this doctrine of punitive damages is appropriate in such a case. Judge Friendly discusses the problem and takes that view also -- or takes that view, and I am impressed by it, and I think its a factor which I am using to support my opinion here, my decision."

> So, I mean, it's not just this case, it's hundreds of other cases, and I don't think punitive damages are designed to be given to one plaintiff or each one of hundreds of plaintiffs in order to punish a defendant for one course of conduct.

Id., transcript at 2359.

In Erwin v. Johns-Manville Sales Corp., et al., No. C-3533 (Tenn. Cir. Ct. Jan. 1982), the Tennessee Circuit Court held that, in every asbestos case before the Court, punitive damages would not be considered at trial as a matter of law:

> It is the opinion of this court that in multiple plaintiff products liability actions the large number of actions and potential compensatory awards serve a sufficient punishment and deterrence and hence an award of punitive damages is unwarranted.

Similarly, in Sanford v. The Celotex Corp., No. 3-84-0698 (M.D. Tenn. Oct.e3, 1984) (a copy of which is attached), the Court stated, "[T]he unique nature of

asbestos litigation necessitates care not to exhaust in a limited number of large punitive damage awards funds needed for possible compensatory awards in multiple asbestos lawsuits." Id., slip op. at 4.

As this Court is aware, the same defendants face multiple exposure from tens of thousands of asbestos workers across the country in one of the most infamous series of cases in history. The magnitude of the liability encountered by the defendants in the asbestos litigation is without precedent and foreseeable dimension. Over one billion dollars has been expended by the asbestos industry to date in asbestos-related litigation. Kakalik, Ebener, Felsteiner, Haggestrom & Shanley, Variation in Asbestos Litigation Compensation and Expenses.

(Institute for Civil Justice, Rand Corp. 1984).

The policy justifications for punitive damages is punishment and deterrence of future conduct of a similar nature. It is manifestly apparent, however, that both objectives are amply achieved in the context of these cases without the imposition of punitive awards. The combined effect of multiple compensatory damage awards throughout the country has been staggering and easily fulfills the goal of punishment.

The objective of deterrence is more than adequately served as to the defendants through the tens of thousands of claims filed and to be filed for compensatory damages. The present behavior of defendants would not be altered by the award of punitive damages

since they no longer manufacturer or distribute asbestos products. Furthermore, the plaintiffs' claims of punitive damages relate to allegations of conduct which occurred fifteen to forty years ago when these defendants had different officers and different boards of directors. No deterrent impact will be realized under these circumstances, and the recovery of such damages, even if warranted, would serve only to punish defendants time and time again for alleged past behavior, contrary to the purposes of exemplary or punitive damages. The massive exposure to compensatory damages facing the defendants stands as a formidable deterrent.

Furthermore, the overall objectives of the tort system -- that is full and fair compensation to persons injured

through the fault of another - are ill-served by permitting punitive damage awards which will ultimately deplete the resources available to compensate future claimants. See, In re Related Asbestos Cases, 566 F. Supp. 818,822 (N.D. Cal. 1983) (corporation's assets "could arguably suffer such serious depletion as a result of punitive damage suits, that the corporation would be unable to provide compensatory damages to future plaintiffs genuinely in need of monetary recovery"); Globus v. Law Research Service, Inc., 418 F.2d 1276 (2nd Cir. 1969), cert. denied, 397 U.S. 913 (1970) (initial punitive damage award might exhaust funds for compensation of later litigants and was therefore eliminated). Additional punitive damages serve only to award the present plaintiffs a windfall far in excess of equitable

compensation for their injuries, and to the detriment of future claimants.

Even if some beneficial punishing or deterring effect is obtained from punitive damage awards, such beneficial effects are more than outweighed by the negative policy effects of awarding punitive damages.

Moreover, the policy justifications for awarding punitive damages are destroyed in jurisdictions such as Texas where liability insurance may be available to defendants. Dairyland County Mutual Ins. Co. v. Wallgreen 447 S.W. 2d 341 (Tex. Civ. App. 1972).

Furthermore, punitive damages are inappropriate in lawsuits where defendants are held strictly liable for compensatory damages.

Strict liability in tort was conceived as a system in which

manufacturers could pass on to customers as a cost of doing business the injuries sustained from defective products. The policy justification is that the manufacturer is in a better position than the plaintiff to absorb the cost of the injuries. The manufacturer in turn passes it on to the consumer in higher prices. If it passes on the losses to the consuming public, the manufacturer is then placed at a competitive disadvantage with other manufacturers and faces a greater chance of business failure. Reduced competition in the market place leads to higher prices and less variety and quality of products. The public pays a social cost of business failures and bankruptcies in the form of less jobs and productivity in our economy. Thus the public ends up

punishing itself in higher prices by awarding punitive damages.

As Judge Friendly observed in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832,838-39 (2nd Cir. 1967), punitive damages developed in a context in which the number of plaintiffs suing on the basis of a wrongful act would be small and could be joined in a single trial. On the other hand, "the legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. Id. at 839. For the past decade the defendants have sought to compensate those legitimate claimants with asbestos-related injury. This focus will continue for years to come. Claims for punitive damages on the other hand threaten to put the defendants into financial ruin, and are blatantly inconsistent with the

goal of fair and just compensation for deserving claimants and their families.

Judge Friendly's greatest concerns are being realized in the asbestos litigation. The ultimate consequence of unrestrained potential liability has already become a partial reality. Johns-Manville, a defendant in almost every asbestos suit in the United States, filed a petition in bankruptcy in 1982. Johns-Manville was the most prominent defendant, ranking 191 among the 500 largest U.S. industrial corporations in 1982. Fortune (May 3, 1985). Several other major defendants have also filed petitions for bankruptcy and many others will be forced to seek bankruptcy protection if their liability remains open-ended as is with repetitive punitive damage exposure.

The Court must remain cognizant of the public policy interests in the asbestos litigation and the national concerns at stake. As the United States Government urged when it intervened as amicus curiae in the appeal of Jackson v. Johns-Manville, 781 F.2d 394 (5th Cir. 1986):

> "Awards of punitive damages [must] be carefully limited to minimize the possibility that some plaintiffs will be denied the ability to obtain compensation for their injuries because others have received awards beyond those designed to compensate for demonstrated injuries." pg. U.S. brief 2 & 3.
>
> In addition to the government's concern that all plaintiffs receive just compensation for their injuries, "the United States is concerned that the private resources involved in the litigation may be eroded, thus preventing full recovery by future plaintiffs and resort will ultimately be had to the public fisc in order to insure full justice for tort victims." Id. at pg. 5.
>
> As noted in the brief, "the taxpayer already bears a significant part of the cost of compensating asbestos

> victims - through various health and income maintenance programs such as Social Security disability, veterans' disability and health care benefits such as medicare/medicaid." Id.

Compensatory damages fully compensate a plaintiff for his injuries. After these injuries are compensated, his equities are not greater than the consumers, the innocent employees and stockholders of a manufacturer or the future claimants. Accordingly, public policy considerations strongly suggest that punitive damages awards should not be permitted in multi-plaintiff products liability cases.

The United States Supreme Court has endorsed the view that Courts should examine public policy interests before assessing punitive damages. The Supreme Court has held that punitive damages should be eliminated or restricted in circumstances where there are overriding

public policy concerns. See, e.g., City of Newport v. Fact Concerts. Inc., 453 U.S. 247,101 S.Ct. 2748 (1981); IBEW v. Foust, 442 U.S. 42 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323(1974). The Supreme Court applied a balancing test in the above cases assessing the potential benefits of a punitive damage award with the possible effects and economic consequences of allowing such awards. For example, in IBEW v. Foust, supra, the Supreme Court held that punitive damages should not be assessed against a labor union for unfair unrepresentation despite the benefits. The Supreme Court applying its balancing test held that:

> Such awards could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents. Inflicting this risk on employees, whose welfare depends Upon the strength of their union, is simply

> too great a price for whatever deterrent effect punitive damages may have. Id. at 50.

Similarly, punitive damages have been denied for violations of certain provisions of the securities laws. See, e.g., deMaas v. Empire Petroleum Co., 418 F.2d 1276, 1285 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970); Green v. Wolf Corp., 406 F.2d 291, 303 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969).

The securities cases present identical issues as are confronted in the asbestos litigation, i.e., the inability to control the overall burden of punitive damages against a single defendant facing multiple lawsuits for the same course of conduct, and the potential for destruction of a viable corporation. Once again, in balancing the potential benefits of punitive

damages awards courts have found that their widespread economic detriment greatly outweighs the value of any surplus deterrence.

In deMaas v. Empire Petroleum Co., supra, the Court stated:

> In addition to the doubt as to whether punitive damages would significantly increase the deterrent power of securities law enforcement, we should also consider whether allowing such damages might create unwarranted problems and injustices. The Second Circuit has expressed concern that juries could award excessive punitive damages for a single transgression, which might severely injure or even bankrupt an otherwise honest defendant. See, Globus v. Law Research Service. Inc., 418 F.2d at 1285.
>
> • • •
>
> It is also argued that punitive damages are inappropriate, at least as used against publicly owned corporations, because the burden would ultimately fall on innocent stockholders.
>
> A more serious hurdle than the above problems is how to control the overall burden of punitive damages against a single defendant for a

> securities fraud violation when claims may be brought in more than one court. If juries in several lawsuits are able to assess punitive damages against the same defendant for the same transaction, there is the danger of overkill.

When applying the Supreme Court's balancing test to the asbestos litigation, it is apparent that any benefit realized by punitive damage exposure in the context of these cases is clearly outweighed by the adverse consequences that would inevitably result.

In a number of cases around the country the trial judges have refused to submit punitive damage issues to the jury. Rimlinger v. Johns-Manville Sales Corp., No. C-6430 (Davidsen County, Tenn. Cir. Ct. Jan.e8, 1981); Labrecque v. Johns- Manville, et al., No. M-77-20 (D. Conn. 1982); Mogard v. Johns-Manville, No. C 137466, Cal. Sup.

Ct., County of Los Angeles (1980); Gill v. Pacor, Philadelphia, Ct. of Common Pleas, Nov. Term, 1977 No. 362 (order of Judge Takiff, August 13, 1982); Pilkington v. Combustion Engineering, Cir. Ct. Orange County, Florida No. 78-952 (Judge Gridley). Hesley v. Pittsburgh Corning Corp., State of Minnesota, District Court, Fourth Judicial District, #776306(1983).

In an earlier asbestos case the court held that "[P]resence alone or knowledge alone or involvement on an association basis without more or even possession of the knowledge without further evidence as to wantonness is insufficient to support the question of punitive damages being considered by the jury." Neal v. Carey Canadian Mines. Ltd., 548 F. Supp. 357,375 (E.D. Pa. 1982) (Punitive damage claims dismissed as to all asbestos

supplier defendants except Johns-Manville).

In all of the above cases, judges or juries have found that the extreme conduct required for a award of punitive damages coupled with the overriding policy concerns makes the award of punitive damages inappropriate in massive multi- plaintiff litigation.

B. The Fifth Circuit Court Decision in Jackson v. Johns-Manville. et al. is not Dispositive on This Issue.

The plaintiffs may argue that the recent Fifth Circuit Court decision in Jackson v. Johns-Manville, 781 F.2d 394 (C.A.5 1986), (en banc) (9 to 5) supports their claims for a punitive damage award. That decision, however, is expressly predicated on principals of

Mississippi law which have no application in West Virginia.

As stated by the Court:

> As a federal Court "it is not for us to adopt innovative theories of [state law), but simply to apply that law as it currently exists", Galindo v. Precision American Corp., 754 F.2d 1212, 1217 (5th Cir. 1985), and to rule as we believe the states highest tribunal would rule, Green, 617 F.2d at 214. We are emphatically not permitted to do merely what we think best; we must do that which we think the Mississippi Supreme Court would deem best. See, e.g. United States v. Little Joe Trawlers. Inc., 776 F.2d 1249, 1253 (5th Cir. 1985) (No. 84-2678 Nov. 19,1985) ("In our Erie role, we make no value judgments as to what [Mississippi) law out to be)). Id. at 397.

The Court made the point many times that its decision was based solely on Mississippi law.

> If the law of Mississippi is to be changed, "it is up to the Supreme Court of [Mississippi] and not this Court to change the substantive law of that state". Cargill. Inc. v. Offshore Logistics, Inc., 615 F.2d 212,215(5th Cir. 1980). Finally under ~ we cannot skirt the clear import of state decisional law solely because

the result is harsh. Parsons v. United States, 460 F3d 228,234(5th Cir. 1972).

The Court of Appeals followed Mississippi law but clearly did so reluctantly. The Court's apprehension in deciding on the appropriateness of awarding punitive damages was apparent throughout the proceedings of the case. In the first instance the Court of Appeals certified this issue to the Mississippi Supreme Court in order to establish the proper interpretation of the state tort law on punitive damages for this case. When the Mississippi Supreme Court refused to rule on the certified issues, the Court was left with the responsibility of deciding the issue of punitive damages on the basis of what it had already determined in choosing to certify was an inadequate legal foundation. Noting this burden the

majority emphasized that their decision was based on Mississippi law irrespective of whether they thought it provided the most reasoned analysis. See, Id. at p. 397.

In a strong dissent, in which five Circuit Judges joined, Chief Judge Clark declared that, "looking backward to the signposts of stare decisis has turned the Court away from the road to justice because this case exceeds the limits of ordinary case and controversy litigation in our complex, interrelated society". Id. at p. 415.

Chief Justice Clark went on to state that the decision was the "wrong response by the wrong Court". Id. at pp. 415-417. He argued it was the wrong response because the Court refused to consider the paramount public policy issues presented by the asbestos

litigation, such as providing "compensation to the majority rather than unjust and excessive rewards to the few". For example, Chief Justice Clark argued that the court should have considered the possibility that future litigants may be deprived of their just compensation. He also stated that the majority perceived the case as "one individual claim against some companies", instead of considering its potentially detrimental effect of denying relief to thousands of the future litigants.

Tens of thousands of similarly situated claimants are already seeking relief against the same defendants, and a legion of other potential plaintiffs stand in the wrings, awaiting the predictable manifestations of their identical exposure. Id. at p. 416.

Finally, Chief Justice Clark maintains that the correct Court to have decided this case was the Supreme Court of the United States.

The problems we face in this litigation are ones of national public policy. To respond to such policy is beyond ability of this diversity-bases (sic) court. Such policy cannot be subjected to the whims of individual states because matters of national public policy have nationwide application. Id. at p. 417.

Many courts have considered the public policy issues outlined by the dissent and have been persuaded by these public policy arguments. The Court should not be influenced by the majority in Jackson, but by the overriding public policy goals enumerated throughout this brief.

III. AWARDS OF PUNITIVE DAMAGES IN A MULTITUDE OF SIMILAR SUITS FOR A SINGLE ACT SUBJECTS THE DEFENDANT TO DOUBLE JEOPARDY.

The constitutional rights of a defendant are violated by the repeated awards of punitive damages in multi-plaintiff product liability suits. The imposition of unlimited punishment for a single act or unified course of conduct violates the Fifth Amendment guarantee against double jeopardy.

The double jeopardy clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The requirements that one's "life and limb" must be twice put in jeopardy is no longer a requirement. Exparte Lange, 85 U.S. (18 Wall) 163, 169-75 (1873) (threat of death or mutilation

eliminated as requirement of double jeopardy).

The double jeopardy clause has evolved to "protect defendants against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 716, 89 S.Ct. 2072, 2076, 23 L. Ed. 2d 656(1969). The double jeopardy clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. Benten v. Maryland, 395 U.S. 784, 794 (1969).

Jeopardy refers to the risks that traditionally arise from a criminal prosecution. Breed v. Jones, 421 U.S. 519,529(1975). Labelling a suit "civil", however, is insufficient to deny application of the double jeopardy clause. Id. at 529. The test is whether the proceeding is essentially criminal. The primary consideration in

deciding whether an action is essentially criminal, is whether the legislature intended the provision to be punitive or remedial. See Melvering v. Mitchell, 303 U.S. 391, 397-98 (1938); United States v. Grunstein & Sons. Co., 127 F. Supp. 907,912 (D.NJ. 1955). Black's Law Dictionary (5th ed. 1979) defines a remedial action is one "which is brought to obtain compensation or indemnity". Id. at 1162. A punitive action, in contrast is defined as having "the character of punishment or penalty". Id. at 1110. In the majority of jurisdiction the goal of punitive damages is punishment. The award is given to the plaintiff in addition to the compensatory award for the injury. The magnitude of repetitive punitive damage awards in the asbestos litigation arguably meeting the Supreme Court's

criteria for protection under the Fifth Amendment.

From the early history of our nation courts have recognized the constitutional problems posed by an award of punitive damages. As early as 1884 courts were refuting the belief that the double jeopardy clause only referred to criminal offenses.

Courts attempted to explain away the apparent conflict with the constitutional inhibition above mentioned; they say that the language there used refers exclusively to criminal procedure, and cannot include civil actions. But this position amounts to a complete surrender of the evident spirit and intent of that instrument. When the convention framed and when the people adopted the constitution both understood the purpose

of this clause to be the prevention of double prosecutions for the same offense. Yet, under the rule allowing exemplary damages, not only may two prosecutions, but also two convictions and punishments, be had. What difference does it make to the accused, so far as this question is concerned, that one prosecution take the form of a civil action, in which he is called defendant? He is practically harassed with two prosecutions and subjected to two convictions; while no hypothesis, however ingenious can cloud in his mind the palpable fact that for the same tort he suffers two punishments [citation omitted]. Murphy v. Hobbs, 7 Colo. 541, 5 P. 119, 120 (1884).

More recently, the United States Supreme Court has considered the issue of whether the double jeopardy clause

applies exclusively to criminal proceeding and has held that a clear rule of distinction does not exist. In Kennedy v. Mandoze-Martinez, 372 U.S. 144,83 S.Ct. 554(1960) the Supreme Court held that labeling a offense civil or criminal could not avoid the necessary constitutional safeguards.

> Whether a sanction is "criminal" and thereby invokes the constitutional double jeopardy protection depends upon its underlying purpose regardless of its label.

In Kennedy, supra, the Supreme Court announced seven factors that should be considered in determining whether a sanction is punitive in nature.

> [w]hether the sanction involves a affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether a alternative purpose to

> which it may rationally be connected is excessive in relation to the alternative purpose assigned. Id. at 168-69 (footnotes omitted).

Each of those seven factors arguably exists in the asbestos litigation. Historically, punitive damages have been awarded as a form of punishment. As is the case with most forms of punishment a award of punitive damages requires a finding of scienter, that is that the defendant acted willfully, maliciously and/or wantonly. As previously discussed in detail the policy justification for punitive damages is punishment and deterrence. The factors enumerated by the Supreme Court in Kennedy, supra, confirm that punitive damages are in fact a quasi-criminal form of punishment and therefore should receive the constitutional protection guaranteed by the Fifth Amendment.

Double jeopardy problems are especially acute in multi-plaintiff liability litigation where the potential for being punished more than once is uncontrolled. As an expert on punitive damages has noted,

> [p]unitive damages for tortious conduct is the only area of law in America where one can be punished and deprived of one's property without clear guidelines or evidentiary safeguards of due process well known to all other forms of legal punishment. Ghiardi & Kircher, Punitive Damages Law and Practice, at § 6.06(1981).

Relying on the constitutional protection against double jeopardy, a number of courts have disallowed punitive damage awards in the asbestos litigation. In LaBrecque v. Johns-Manville Sales Corp., Civil Action No. H-77-201 (Feb. 1982); Morency v. Johns-Manville, Civil Action No. 77400 (May, 1983). The Honorable M.J.

Blumenfeld of the Federal District Court in Connecticut dismissed the claims for punitive damages in the above cases stating that the imposition of punitive damages throughout the country exposed the defendants to double jeopardy in violation of their constitutional rights.

> [T]he defendants are open to punishment by way of punitive damages even in jurisdictions which will not limit the amount as they do in Connecticut, in many states throughout the country, and in hundreds, maybe thousands of cases.
>
> Well, you might run into what Mr. Rottner yesterday said, that this would be cruel and unusual punishment, or might be double jeopardy if they're going to be punished in every case of every plaintiff, because there may be a thousand cases.

The Honorable Howard Vann, Circuit Court Judge in Hillsborough County, Florida ordered that punitive damages would not be allowed against defendants

who had been assessed punitive damages in prior asbestos cases.

Judge Van voiced his opposition to awarding punitive damages in multiple product liability cases.

> I am concerned very much about and I have stated for at least the past three years the question of punitive damages in mass marketing .....
>
> And, I have expressed my opposition to punitive ... to defendants being hit time and time again. And, I don't think that's the purpose of punitive damages.

Many courts throughout the country have begun to realize the impact of punitive damage awards on defendants in the asbestos litigation. The defendants in the above-captioned cases have paid out millions of punitive damage awards throughout the country and have in fact been assessed punitive damage in the Texas asbestos litigation. Further exposure to punitive damage awards in

the above-captioned cases places the defendants in a double jeopardy situation in violation of their Fifth Amendment rights.

The second purpose of the double jeopardy clause is to prevent punishment that is incommensurate with a defendant's level of culpability. The potential for punitive damage awards far in excess of the defendant's culpability in the asbestos litigation is a serious and real danger. Large assessments of punitive damages threaten the continued viability of most manufacturing concerns. The increasing number and size of such awards raise concern for the future stability of the defendants still remaining in the asbestos litigation. Numbers of companies have filed for bankruptcy. Johns-Manville, a defendant in almost every asbestos suit in the

United States, filed a petition in bankruptcy in 1982. Several other major and minor defendants have also filed petition for bankruptcy and many others will be forced to seek this protection if their liability remains open-ended as is with repetitive punitive damage exposure.

Additionally, most jurisdictions, including West Virginia, follow the rule of joint and several liability. Joint and several liability requires that each defendant who is found to have been a cause of the plaintiffs injuries shall be 'jointly and severally" liable for the entire amount that the plaintiff is entitled to recover, subject to a right of contribution for payments in excess of the defendant's percentage share. The existence of joint and several liability becomes important when one or more

defendants are insolvent. When a defendant is insolvent the goal of allocating the loss among those responsible cannot be achieved. Nevertheless, those defendants who remain solvent must compensate the plaintiff thereby imposing the risk of a insolvent defendant on the remaining defendants. This results in the solvent defendants paying more than their fair share of the compensatory damages. Therefore the solvent defendants have been paying a disproportionate amount of the compensatory damages in addition to the uncontrolled and repetitive punitive damage awards. This creates a situation where the punishment is not commensurate with the defendant's level of culpability and therefore violative of the defendant's Fifth Amendment rights.

Substantive constitutional issues are raised by subjecting a defendant to multiple awards in numerous, separate cases in different jurisdictions without any control over the number, size, or proportion of the awards. In that the defendants here have been subjected to punitive damages in numerous cases, including, but not limited to, Texas, further exposure puts the defendants in double jeopardy. In addition, the defendants have been punished with punitive damages in other cases and are continuing to be punished by the staggering amount of plaintiffs cases being filed each day. It has reached the point in the asbestos litigation where the punishment far outweighs the crime. Therefore, the claim for punitive damages in the instant case should be dismissed because it is & violation of

the double jeopardy clause of the Fifth Amendment.

IV. THE STANDARD FOR AWARDING PUNITIVE DAMAGE IS SO VAGUE AS TO DENY DEFENDANTS' RIGHT TO DUE PROCESS.

The United States Supreme Court has clearly established that the term "citizen" in the United States Constitution is to apply equally to corporations for purposes of the due process clause of the Fifth and Fourteenth Amendments. Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394(1886). The Fifth Amendment states that "no person shall be deprived of life, liberty or property without due process of law .6.6. U.S. Constit. Amend. V. Due Process is required in any legal proceeding by which a person may be deprived of life, liberty or

property. Shaffer v. Heitner, 433 U.S. 186 (1977). In reviewing a proceeding to determine its procedural fairness, courts review the system of decision-making to determine whether a person has been deprived of life, liberty or property without the fair procedure or due process required by the Fifth and Fourteenth Amendments.

Awards of punitive damages in the asbestos litigation are violative of due process in a number of ways. An award of punitive damages violates the due process clause because the standard for imposing such an award is unconstitutionally vague and arbitrary. Imposition of punishment, based on a vague and unclear standard is constitutionally prohibited:

> It is established that a law fails to meet the requirement of the Due Process Clause if it is so vague and

> standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. [citation omitted]

Giaccio v. State of Pennsylvania 382 U.S. 399, 402, 403 (1966).

The U.S. Supreme Court has held that the void for vagueness prohibition applies to any punishment, whether labeled penal or civil, which exact. . . ". . . obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." A.B. Small Company v. American Sugar Refining Co., 267 U.S. 233,239(1925). See, also, Giaccio v. State of Pennsylvania, supra.

The term punitive is vague and indefinite, the meaning and standards varying from state to state. Terms such as 'willful', 'wanton', 'conscious

indifference', 'reckless disregard', 'recklessness', and 'gross negligence' are put forth as the criteria for determining punitive damages in most product liability cases. Courts rarely define the meaning of such words. Yet juries are asked to pass judgment on the defendant's mental state at the time of his conduct without the support of guidelines.

In most cases juries are asked to decide in the first instance on the content of the standard to be applied and in the second instance on whether the defendant's conduct falls within that standard. Consequently, juries are given wide discretion in awarding punitive damages with little guidance. Therefore, juries are left to decide the issue of punitive damages based on their sympathies and prejudices. In product

liability actions where the defendants are corporations the problem is more acute because juries see an unlimited fund from which to draw such awards.

More importantly vague standards leave defendants uncertain as to what conduct is prohibited. Due process requires that a defendant have notice that certain types of conduct are punishable. In most product liability actions manufacturers determine only after the fact, that certain conduct will result in punishment. Therefore, the requirement of due process, that is that defendants be given adequate notice or a clear idea of the prescribed conduct, in advance, is not satisfied.

Furthermore, vague concepts such as "recklessness" or "conscious indifference" leave courts and juries room to expand the standard of liability

to include a wide range of conduct. There is nothing in the concept of "recklessness" or "conscious indifference" to limit the potential expansion. This forces product manufacturers to adhere to constantly changing standards of liability. Therefore, defendants are never certain of the standard of liability they will be held to. This is clearly a violation of the defendants' due process. Ausness, Retribution and Deterrence: The Role of Punitive Damages in Product Liability Litigation, Kent. LJ. Vol. 74, No. 1, (1985-86) pg. 57. In reality punitive damage standards are so vague as to provide the defendant with no standard at all and therefore are unconstitutional under Gioccio v. State of Pennsylvania 1382 U.S. 399, 202, 403 (1966).

In West Virginia, as elsewhere, the standard to be applied for imposing punitive damages is extremely vague. The case law is confusing, providing for a variety of interpretation and standards for imposing punitive damages.

West Virginia courts have held that punitive damages cannot be justified merely on the grounds that a defendant committed a wrongful act and is liable for compensatory damages.

Moreover, there is no effective appellate control over jury awards of punitive damages. Most appellate courts decline to review punitive damage awards because imposing punitive damages is within the discretion of the jury. In order for a reviewing court to reverse a finding by the jury on the issue of punitive damages, it must find, after viewing the evidence in the light most

favorable to the defendant, that a reasonable person could not have found that the defendant's conduct fell within the applicable standard. See, e.g., Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757,819,174 Cal. Rptr. 348,388(1981); Dorsey v. Honda Motor Co., 655 F.2d 650,655-56(5th Cir. 1981) modified 670 F.2d 21(5th Cir. 1982). Ellis, Fairness and Efficiency in The Law of Punitive Damages, So. Cal. IL Rev. Vol. 56 (Nov. 1982) 1, 39.

As the Supreme Court stated in Gertz v. Robert Welch, Inc., 418 U.S. 323,350 (1974):

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.

For example, Appellate Review in Texas of punitive damage awards

protected defendants with a standard of review called the "some evidence" or "some care" test. This test permitted appellate courts to render judgment in favor of the defendants where there was evidence showing "some care" was exercised by the defendant in a punitive damage case. The courts took the position that "any" or "some care" did not rise to the standard of gross negligence which required a entire want of care. Sheffield Division. Armco Steel Corp. v. Jones, 376 S.W.2d 825 (Tex. 1964).

The Texas Supreme Court, however, struck down the "some care test" in Burk Royalty Co. v. Walls, 616 S.W.2d 911 flex. 1) and the companion case of Putnam v. Missouri Valley, Inc., 616 S.W.2d 930 flex. 1981). The Court replaced the "some care test" with the

"no evidence" test. The "no evidence" test means that the Appellate Court will not review awards of punitive damages where there is the lease (sic) amount of evidence from which a jury could infer that the conduct in question could qualify under the vague standard of gross negligence or conscious indifference. The effect of this new standard is to make it easier for plaintiffs to obtain a punitive damage award in Texas. Defendants are, in reality, left without adequate appellate protection which could remedy any "unfairness" that may exist in the system.

Further due process questions are raised by the proceedings in which punitive damages are imposed. The decision-making process in which punitive damages are assessed against

defendants violate the due process clause of the Fifth Amendment. As previously discussed, punitive damage sanctions are essentially "criminal", yet defendants, in the civil arena, are not afforded the same legal protections that are required for criminal cases. Since punitive damages are awarded in a civil action plaintiffs are only required to meet and prove punitive damages by the lesser burden of proof called the preponderance of the evidence. Many legal commentators have argued that the procedure for imposing punitive damages violates the due process clause because they subject defendants to punitive sanctions similar to criminal fines without affording them the procedural and substantive safeguards which are afforded criminal defendants. These commentators suggest

that defendants in punitive damage actions be afforded the same procedural safeguards available to defendants in criminal actions. See, Ausness, Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigations, Kent I--I. Vol. 74, No. 1985-86; Ellis, Fairness and Efficiency In The Law of Punitive Damages, So. Cal. L Rev. Vol. 56, Nov. 1982 No. 1 pg. 32-33.

A federal Interagency Task Force examined the state of product liability law in the United States and drafted a Uniform Product Liability Act (hereinafter referred to as the "UPLA"). The UPLA model provision regarding punitive damages, recognized that punitive damages are in fact criminal sanctions. Therefore, the UPLA provides defendants with adequate constitutional

protections. The UPLA acknowledged that serious constitutional questions are raised when punitive damages are applied in a civil case without the benefit of the constitutional protections available under criminal law. The UPLA moved toward a criminal standard for the award of punitive damages requiring the claimant to prove by "clear and convincing" evidence that punitive damages are justified.

In addition, the UPLA provides for allowing the trier of fact to determine whether punitive damages should be awarded but requires the Court to determine the amount of those damages. This approach is in accord with the general practice of criminal law where the jury determines "guilt or innocence" and the court imposes the sentence. The UPLA, however, provides the judge with

concrete guidelines and sets forth eight factors to be considered in determining the amount of punitive damages. This is particularly important in product liability cases where, under current law, product sellers are potentially subject to repeated imposition of punitive damages for harm caused by a particular product. Many states have adopted versions of the UPLA regarding these constitution safeguards.

The present state of punitive damage law in West Virginia fails to provide juries or judges with any guidelines for imposing punitive damages, nor does it provide the defendant with the procedural safeguards required by due process. The absence of any constitutional protections for awarding punitive damages in Texas violates the

defendant's constitutional rights and recognized principals of due process.

In addition to requiring clear standards and safeguards for assessing sanctions, the due process clause also requires what is referred to as "fundamental fairness". Due process requires, in whatever context, that legal procedures be consistent with "fundamental fairness", that they be consonant with "ordinary notions of fair play and the settled rules of law", that they accord with "traditional notions of fair play and substantial justice". Lassiter v. Dept. of Soc. Serv., 452 U.S. 18,25(1981); Connally v. General Constr. Co., 269 U.S. 385, 391(1926); International Shoe Co. v. Washington 326 U.S. 310,320(1945). See Jefferies, Comment on Constitution of Punitive Damages.

There exists a "fundamental unfairness" in multiple plaintiff product liability cases where defendants face multiple punitive damage awards, excessive verdicts, vague standards of conduct, insufficient constitutional procedures and inadequate supervision or review of jury awards. These injustices are magnified in the asbestos litigation where the same defendants are also required to pay more than their fair share of the compensatory damages under the law of joint and several liability.

In Lassiter v. Dept. of Soc. Serv., the Supreme Court summarized the intent of due process and articulated guidelines to be followed in determining its application to a particular situation.

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined.

> "(unlike some legal rules]" this Court has said, due process "is not a technical concept with a fixed content unrelated to time, place and circumstances". Rather, the phrase expresses the requirement of "fundamental fairness", a requirement whose meaning can be as opaque as its importance is lofty. Applying the due process clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any precedents and then by assessing the several interests that are at stake. 452 U.S. 18,24-25(1981).

Multiple product liability cases are a recent phenomenon. Consequently, there does not exist an entire body of law in which to review for relevant precedents. The few courts that have considered the "fundamental fairness" issue in multiple product liability cases have found that the due process clause is violated by repeated awards of punitive damages. "A defendant has a due process right to be protected against unlimited multiple punishment for the same act... because

overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process." Dalkon Shield, 526 F. Supp. at 899.

The Court in Lassiter, noted that aside from considering precedents one should also "assess the several interests at stake". Id. at 24-25. There are important societal interests at stake in this litigation. This brief has noted the tremendous burden the asbestos litigation has had on the country and the judicial system. Billions of dollars have been expended to prosecute and defend these cases. Numerous companies have filed for bankruptcy and many others threaten to. The future of these manufacturing entities, which no longer produce asbestos- containing products, are in jeopardy. These defendants are

corporations that are producing products, employing persons, paying taxes and providing needed services. These are strong public policy interests that are appropriate for this court to consider in making its decision regarding punitive damage awards. As the Supreme Court aptly noted:

> Applying the due process clause is therefore a uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation... Lassiter, Id., at 24-25.

The Court here has the opportunity to correct the fundamental unfairness that exists in the asbestos litigation by dismissing the claims for punitive damages in the above-captioned cases.

V. REPETITIVE PUNITIVE DAMAGE AWARDS THROUGHOUT THE COUNTRY AMOUNT TO UNCONSTITUTIONALLY "EXCESSIVE FINES" IN VIOLATION OF THE EIGHTH AMENDMENT.

Repetitive punitive damage awards in the asbestos litigation for a single course of conduct amount to an unconstitutionally excessive fine in violation of the Eighth Amendment. The Eighth Amendment of the U.S. Constitution provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted'. Arguably punitive damages are "fines", which are imposed upon the defendant as a penalty above and beyond what is needed to compensate the plaintiff for his injuries. Punitive damages are awarded to punish the defendant. Although the penalties are paid to a private individual as opposed to the government the result to the defendant is the same. Therefore, a distinction between whether a fine is assessed by the government or

enacted by a private tort plaintiff should have no consequence.

The Supreme Court however, has suggested that the ban on cruel and unusual punishment should be limited to criminal sanctions. See Ingraham v. Wright 430 U.S. 651, 664-68(1977). The Court, however, recognized that such a limited perspective may lead to abuses. Therefore, the Court stated that certain punishment should be treated as criminal for purposes of the Eighth Amendment even though they are not explicitly so labeled. Id. at 669 n. 37. It is important to point out that a nominally civil fine can be as "excessive" as a criminal one and therefore in violation of the spirit of the Eighth Amendment.

The critical point to note is that punitive damages are in fact a form of punishment, as previously discussed. The

duplicative nature of awards of punitive damages in the asbestos litigation should be deemed excessive and therefore unconstitutional. The same defendants are consistently being punished by excessive and sometimes gratuitous awards of punitive damages which have no rational relation to the defendant's conduct which took place many years ago.

Arguably the Eighth Amendment argument is not as clearly established as the other constitutional arguments outlined here on behalf of the defendants. When, however, the Court considers that these same defendants are required to pay more than their fair share of the thousands of compensatory damages because of joint and several liability, in addition to the thousands of claims for punitive damages in this

litigation, the notion of "excessive fines" becomes much clearer.

VI. THE DEFENDANTS' DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE 3, SECTION 10 AND SECTION 17 OF THE WEST VIRGINIA CONSTITUTION ARE VIOLATED BY PERMITTING MULTIPLE PUNITIVE DAMAGE VERDICTS AND BY REQUIRING A SEPARATE LIABILITY JURY TO ASSESS A MULTIPLIER WITHOUT ALL THE EVIDENCE, WITHOUT ANY GUIDELINE AS TO WHAT A FAIR MULTIPLIER MIGHT BE.

A long shadow has been cast over the propriety of the process followed in state courts in arriving at punitive damage awards. The Supreme Court of the United States has suggested that it is ready to receive and consider Eighth Amendment claims of excessive fines and Fourteenth Amendment due process clause claims in relation to punitive damages. See Aetna Life Insurance Company v.

LaVoie, 470 So.2d 1060 (Ala. 1984); rev'd 475 U.S. 813, 89 L.Ed.2d 823, 106 S.Ct. 1580 (1986), aff'd. conditionally, 505 So.2d 1050 (1987); Bankers Life & Casualty Company v. Crenshaw, 486 U.S ___ 100 L.Ed.2d 62,108 S.O. 1645 (1988). As previously noted, the United States Supreme Court has granted certiorari to consider the issue of punitive damages in the case of Browning-Ferris Industries of Vermont. Inc. v. Kelco Disposal, Inc., 845 F.2d 404 (2d Cir. 1988), Cert. granted, No. 88-556, 102 L.Ed.2d 559.

The United States District Court for New Jersey recently held in a memorandum opinion that the allowance of multiple punitive damage claims in the context of mass liability tort litigation violates due process. The opinion states in part as follows:

> Punitive damage awards have their deficiencies, however, some of which inhere in all such awards and some of which are unique to mass tort claims. Common to all is the fact that the amount of the fine can be excessive in respect to the conduct involved or the person or entity assessed. No limits are imposed. Certainly, no criminal statute would be tolerated which left to a judge or a jury the unfettered discretion to determine what penalty would be appropriate in any given case. No standard or uniformity exists. Different juries hearing the identical evidence as to the same defendant might award vastly different sums or none at all.

The court in a criminal matter may consider the defendant's ability to pay in determining the fine to be imposed, but no statute would be permitted which failed to set the maximum possible penalty faced by a defendant. Although the penalty imposed in a civil matter may far exceed that provided for under a criminal statute for the same conduct, none of the same safeguards are provided. The standard of proof for the

imposition of such penalties is lesser in civil matters, even though the exposure may be far greater. Privileges such as the right against self-incrimination are usually inapplicable.

Substantial punitive damage awards have the ability to financially destroy an individual, a business or a entire industry. Such insolvency may be warranted or justified because of the nature of the conduct involved, but it is an awesome power to place in the hands of a jury without limitations or guidelines.

Fines paid in criminal matters to go (sic) the public treasury. Punitive awards go to the fortuitous plaintiff. In many instances, it is a windfall.

All of the foregoing defects are exacerbated in mass tort litigation. Defendants can be held liable over and

over again for the same conduct, a result which would be barred by virtue of the right against double jeopardy in a criminal matter. Although an award in an individual case may be fair and reasonable, the cumulative effect of such awards may not be. Nor is the cumulative effect of such awards reviewable by a singles court, since the matters are permitted to proceed and be reviewed separately and independently.

Payment to individual plaintiffs rather than to a fund or class raises special problems in mass tort litigation. There is a decided risk that the earlier claimants will deplete the available assets to pay later claimants. Such a risk may east even as to compensatory damages, but it would seem inappropriate to impose repeated penalties on a company if the result is

to deny damages to subsequent claimants. If there is limited fund, priority should be given to compensating those who have been injured rather than conferring windfalls on those who have already been compensated.

Although recognizing the nature of a corporation as a continuing legal entity, the fact is that punitive damage awards, if imposed decades after the wrongful conduct, frequently punish officers who did not participate in such conduct and shareholders who did not benefit from it. Furthermore, if the successive fines serve to render companies insolvent, innocent employees and their creditors are injured as well.

It may be that the conduct of a particular defendant has been so outrageous and egregious that a jury wishes by the size of its award to

prevent that company from continuing to function. Even assuming that a jury should have the awesome power to mete out such drastic punishment, it should do so intentionally, and not inadvertently by unknowingly combining its verdict with those in the past and those yet to come.

None of the foregoing, standing alone, may be sufficient to constitute a violation of the constitutional rights of these manufacturers, but taken in combination they do infringe upon their right to due process. Opinion dated March 9, 1989, pages 2-5, Juzwin v. Amtorg Trading Corp., No. 87-3876 (D.N). March 9, 1989).

For all the reasons set forth in Juzwin punitive damages must only be considered by a jury under the maximum constitutional protections. The

constitutional protections must include a clear standard for the award of punitive damages; guidelines as to all relevant evidence, all defenses, and the appropriate burden of proof; requirements for a foundation in actual damages with an appropriate relationship to the harm caused and actual damages; and finally, limitations to avoid individual and cumulative excess wards, repetitious trials and verdicts.

In Muzelak v. King Chevrolet. Inc., 368 S.E.2d 710 (W. Va. 1988) this Court observed that punitive damages should not be reduced unless they seem monstrous. This standard is very similar to the standard followed in Vermont and at issue in the Browning-Ferris appeal. Having taken the "reasonable relationship" lid off punitive damage awards and having left the determination

of punitive damages to an inherently subjective jury process, West Virginia has invited a constitutional attack on its approach to the determination of punitive damages.

A punitive damage award under West Virginia case law as cited infra is indistinguishable form an assessment of a criminal line. In criminal cases, the state is required to clearly articulate its basis for punishment. Failure to do so violates a defendant's due process. The same failure may be unconstitutional in a civil case. As Justice O'Connor wrote in her concurring opinion in Bankers Life & Casualty Company v. Crenshaw, 100 L.Ed.2d at 78:

> Appellate has touched on a due process issue that I think is worthy of the Court's attention... Mississippi Law gives juries discretion to award any amount of punitive damages in any tort case in

> which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this my violate the Due Process Clause.

Justice O'Connor seeks a close scrutiny of the procedures that surround a punitive damages award. That scrutiny may well come in the case of Browning-Ferris Industries of Vermont. Inc., et al. v. Kelco Disposal. Inc., No. 88-556, in which the United States Supreme Court granted certiorari to consider a punitive damage verdict rendered in Federal District Court in Vermont. The case is scheduled for argument in April, 1989.

VII. CONCLUSION

The tort system is designed to compensate persons injured through the

fault of another: Punitive damages, on the other hand, have little to do with compensating injured victims but rather are designed to punish and deter actions which are deemed socially undesirable. Whereas, in the context of the asbestos litigation, the motivating policies behind punitive damages are not achieved, it is inappropriate to permit their award. This is especially so since allowing them may ultimately result in a deprivation of compensation to future claimants.

Pittsburgh Corning Corporation has had a punitive damage verdict rendered against it in an asbestos case in the Carper case in the Circuit Court of Kanawha County, West Virginia. This verdict has been satisfied.

Fibreboard Corporation recently had punitive damages awarded against it in

Monongalia County. Jennings Davis v. OCF. et al. This verdict is under appeal.

A punitive damage verdict has been rendered against Pittsburgh Corning Corporation and Fibreboard Corporation in Phase I of a consolidated "Mass Liability" trial involving 315 cases in the Circuit Court of Kanawha County, West Virginia in Denver Turley. et al. v. Owens-Corning Fiberglas. et al., Civil Action No. 84-C-3321 [In Re: Asbestos Cases].

OWENS-ILLINOIS, INC.
PITTSBURGH CORNING CORPORATION
FIBREBOARD CORPORATION AND
KEENE CORPORATION

By SPILMAN, THOMAS, BATTLE
& KLOSTERMEYER

/s/ illegible
David K. Hendrickson
Eric M. James
Post Office Box 273
Charleston, West Virginia 25321

92-359

No. (3)

Supreme Court, U.S.
FILED
AUG 25 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

—v.—

LEONARD ADAMS, *et al.*,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

Of Counsel:

STUART E. RICKERSON
Vice President–
General Counsel
Keene Corporation
200 Park Avenue
New York, New York 10166
(212) 557-1900

ANDREW T. BERRY
Counsel of Record
GITA F. ROTHSCHILD
MCCARTER & ENGLISH
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(201) 622-4444

Attorneys for Petitioner, Keene Corporation

TABLE OF CONTENTS

Page

Judgment Order of the Circuit Court of Monongalia County West Virginia Denying Defendants' Post-Trial Motions and Entering Judgment in Favor of Plaintiff John Chapman, Dated March 11, 1992..... SA-1

Judgment Order of the Circuit Court of Monongalia County West Virginia Denying Defendants' Post-Trial Motions and Entering Judgment in Favor of Plaintiff Terry Lee England, Dated March 11, 1992..... SA-8

Judgment Order of the Circuit Court of Monongalia County West Virginia Denying Defendants' Post-Trial Motions and Entering Judgment in Favor of Plaintiff Everett E. Johnson, Dated March 11, 1992..... SA-13

Judgment Order of the Circuit Court of Monongalia County West Virginia Denying Defendants' Post-Trial Motions and Entering Judgment in Favor of Plaintiff Joseph E. Shilot, Dated March 11, 1992..... SA-20

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

JOHN CHAPMAN, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that Plaintiff John Chapman's compensatory damages were determined by the Jury to be Three Hundred Twenty-Four Thousand Two Hundred Dollars ($324,200.00). The Court does hereby further find that the Plaintiff John Chapman had negotiated settlements in his case totalling One Hundred Forty-Four Thousand Eight Hundred Dollars ($144,800.00) prior to said verdict. The Court does in addition find that Nine Thousand Six Hundred Dollars ($9,600.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the

appropriate amount of set-offs from the Three Hundred Twenty Four Thousand Two Hundred Dollars ($324,200.00) compensatory verdict shall be One Hundred Thirty-Five Thousand Two Hundred Dollars ($135,200.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was (sic) the Defendants Owens-Corning Fiberglas and Keene Corporation. The Defendants Owens-Corning Fiberglas and Keene Corporation is (sic) therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of One Hundred Eighty-Nine Thousand Dollars ($189,000.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Two Hundred Nineteen Thousand Dollars ($219,000.00) prior to perfecting any

appeal in this matter, plus an additional amount of $22,000.00 dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of One Hundred Ninety-Four Thousand Dollars ($194,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $20,000.00 dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy.

The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of action from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning
Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-832

TERRY LEE ENGLAND,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Fifteen Thousand Dollars ($15,000.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendants Keene Corporation and Owens-Corning Fiberglas shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages and the Defendant Keene Corporation is ordered to pay the plaintiff the sum of Five Thousand Dollars ($5,000.00) in punitive

and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty Thousand Dollars ($30,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,000.00 dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 Dollars.

This Court previously having ruled that the cases listed herein did

not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-763

EVERETT E. JOHNSON, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that Plaintiff Everett E. Johnson's compensatory damages were determined by the Jury to be Fifty-Eight Thousand Five Hundred Dollars ($58,500.00). The Court does hereby further find that the Plaintiff Everett Johnson had negotiated settlements in his case totalling Twenty-Five Thousand Five Hundred Seventy-Five Dollars ($25,575.00) prior to said verdict. The Court does in addition find that One Thousand Seven Hundred Twenty-Five Dollars ($1,725.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the

appropriate amount of set-offs from the Fifty-Eight Thousand Five Hundred Dollars ($58,500.00) compensatory verdict shall be Twenty-Three Thousand Eight Hundred Fifty Dollars ($23,850.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict booth jointly and severally was (sic) the Defendants Owens-Corning Fiberglas Corporation and Keene Corporation. The Defendants Owens-Corning Fiberglas and Keene Corporation is (sic) therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Thirty-Four Thousand Six Hundred Fifty Dollars ($34,650.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Sixty-Four Thousand Six Hundred Fifty Dollars ($64,650.00) prior to perfecting

any appeal in this matter, plus an additional amount of $6,500.00 dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty-Nine Thousand Six Hundred Fifty Dollars ($39,650.00) prior to perfecting any appeal in this matter, plus an additional amount of $4,000.00 dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy.

The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning
Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

JOSEPH E. SHILOT, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Twenty-Two Thousand Dollars ($22,000.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendants Keene Corporation and Owens-Corning Fiberglas shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages and the Defendant Keene Corporation is ordered to pay the plaintiff the sum of Five Thousand Dollars ($5,000.00) in punitive

and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty Thousand Dollars ($30,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,000.00 dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 Dollars.

This Court previously having ruled that the cases listed herein did

not involve claims for risk of subsequently developed lung cancer or mesothelioma, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer and colon cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related lung malignancy, including lung cancer or mesothelioma. The Court has specifically ruled that claims for asbestos-related lung malignancies constitute causes of actions separate from claims for asbestos pleural disease, parenchymal asbestosis, laryngeal or colon cancer and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

Supreme Court, U.S.
FILED
SEP 14 1992
OFFICE OF THE CLERK

No. 92-359

In The

Supreme Court of the United States

October Term, 1992

KEENE CORPORATION,

Petitioner,

v.

LEONARD ADAMS, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Circuit Court Of Monongalia County, West Virginia

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

TYBE A. BRETT*
THEODORE GOLDBERG
HENDERSON & GOLDBERG, P.C.
1030 Fifth Avenue
Pittsburgh, PA 15219
(412) 471-3980

SCOTT S. SEGAL
SEGAL & DAVIS
810 Kanawha Blvd., East
Charleston, WV 25301
(304) 344-9100

Attorneys for Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether it is proper for a jury to impose multiple punitive damage awards against a defendant who mass markets defective products for years after knowledge of the defect injuring thousands of victims when such awards further the applicable substantive state law.

2. Whether a jury award of punitive damages, reviewed and upheld by the trial court and the state appellate court, comports with due process when the defendant had the opportunity to present all relevant evidence and raised no issues warranting closer post-verdict scrutiny.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

RULES INVOLVED 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. The Propriety Of Multiple Punitive Damage Awards Against A Defendant Who For Years After Knowledge Of The Defect Mass Markets Defective Products Is A Matter Of State Substantive Law 6

A. The Awards Of Punitive Damages In These Cases Furthered The Purposes Of Punitive Damages Under West Virginia Law 8

B. Even If Evidence Of Multiple Punitive Damage Awards Is Relevant To The Consideration Of The Jury And The Trial Court, Petitioner Was Not Denied The Opportunity To Present Evidence Of Such Awards 14

C. Multiple Punitive Damages Do Not Violate Due Process In These Cases 17

II. The Post Trial And Appellate Review In These Cases Satisfied The Demands Of Due Process .. 18

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 7, 18

Board of Education v. Zando, Martin & Milstead, Inc., 182 W. Va. 597, 390 S.E.2d 796 (1990) 12

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 7

Burnham v. Superior Court of California, 495 U.S. 604 (1990) 8

Davis v. Celotex Corp., 1992 WL 130567 (W. Va. June 12, 1992) ..... *passim*

Day v. Woodworth, 13 How. 363, 14 L. Ed. 181 (1852) 8

Dunn v. Owens-Corning Fiberglas, 774 F. Supp. 929 (D.V.I. 1991) 17

Fleming Landfill v. Garnes, 186 W. Va. 656, 413 S.E.2d 897 (1991) ..... *passim*

Glasscock v. Armstrong Cork Co., 946 F.2d 1085 (5th Cir. 1991), *cert. denied sub nom. Celotex Corp. v. Glasscock*, 112 S. Ct. 1778 (1992) 7, 14

Harless v. First National Bank in Fairmont, 169 W. Va. 673, 289 S.E.2d 692 (1982) 10

Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986) 7, 17

TABLE OF AUTHORITIES – Continued

Page

Jarvis v. Modern Woodmen of America, 185 W. Va. 305, 406 S.E.2d 736 (1991) 10

Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir.), *cert. denied sub nom. Celotex Corp. v. Johnson*, 111 S. Ct. 297 (1990) 7, 13, 17

King v. Armstrong World Industries, Inc., 906 F.2d 1022 (5th Cir. 1990), *cert. denied sub nom. Celotex Corp. v. King*, 111 S. Ct. 2236 (1991) 7

Leonen v. Johns-Manville Corp., 717 F. Supp. 272 (D.N.J. 1989) 13, 17

Pacific Mutual Life Ins. Co. v. Haslip, 111 S.Ct. 1032 (1991) ..... *passim*

Racich v. Celotex Corp., 887 F.2d 393 (2d Cir. 1989) .13, 17

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967), *limited in Morrissey v. National Maritime Union of America*, 544 F.2d 19 (2d Cir. 1976) 12

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 7

Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2d Cir.), *cert. denied sub nom. Pittsburgh Corning Corp. v. Simpson*, 111 S. Ct. 27 (1990) 7, 13, 17

State v. Fortner, 182 W. Va. 345, 387 S.E.2d 812 (1989) 13

State v. Myers, 171 W. Va. 277, 298 S.E.2d 813 (1982) 13

State ex rel. Lehman v. Strickler, 174 W. Va. 809, 329 S.E.2d 882 (1985) 13

United States v. Halper, 490 U.S. 435 (1989) 7

TABLE OF AUTHORITIES – Continued

Page

RULES

West Virginia Rules of Appellate Procedure 3 1

West Virginia Rules of Appellate Procedure 4 1

West Virginia Rules of Appellate Procedure 4A..... 1

West Virginia Rules of Appellate Procedure 5 1

West Virginia Rules of Appellate Procedure 7 1

RULES INVOLVED

West Virginia Rules of Appellate Procedure 3, 4, 4A, 5 and 7 are reprinted in the Respondents' Appendix at 1.

STATEMENT OF THE CASE

These asbestos personal injury cases were tried in a West Virginia state trial court under West Virginia law of products liability. In October/November of 1990, thirty-six cases were consolidated and tried in two courtrooms before the Honorable Larry V. Starcher and the Honorable Robert B. Stone against Petitioner Keene Corporation and one other defendant.

Following is a synopsis of the evidence offered by Plaintiffs/Respondents in support of their claim of punitive damages. The uncontradicted evidence at trial showed virtual universal recognition that asbestos products were dangerous in the 1930s. Testimony by John McAllister, a research chemist with Keene's predecessor, Baldwin-Ehret-Hill, showed that he knew of these hazards in the early 1950s and so informed his superiors. (McAllister Deposition at 65-69). Nonetheless, Keene never placed a label on its products until, at the earliest, 1966. Even this evidence of warnings was contradicted by testimony of workers as well as that of Keene's own retired president, Alvin Ehret. (Ehret Deposition at 91-96). Further, the purported warning noted only the dangers of excessive exposure, despite Keene's concession that it knew of the risks of low level exposure by 1964. (Keene's Petition for Appeal to the West Virginia Supreme Court of Appeals at 8). Indeed, Keene admitted

that a jury reasonably could have concluded that its duty to warn arose in 1955. (Keene's Petition for Appeal to the West Virginia Supreme Court of Appeals at 17).

The Courts instructed the juries on punitive damages as follows:

> The Court instructs the jury that in addition to compensatory damages, which if awarded are against a given defendant to compensate for actual injury, the law permits the jury under certain circumstances to award punitive damages against such defendant in order to punish such defendant or to deter others.
>
> The Court instructs the jury that under West Virginia law a defendant may be held liable for punitive damages in actions of tort such as this where the evidence reveals that a defendant in actions where punitive damages is sought was guilty of gross fraud, malice, oppression, or wanton, willful or reckless misconduct or criminal indifference to civil obligations affecting the rights of others. Therefore, you are instructed that if you believe that either defendant corporation was guilty of gross fraud, malice, oppression, or wanton, willful or reckless misconduct or criminal indifference to its civil obligations then you may award punitive damages against said defendant.
>
> The Court instructs the jury that punitive damages are awarded to punish a defendant and to deter others from pursuing a like course of conduct. The amount of punitive damages awarded, when considered together with compensatory damages, should be in such amount as the jury believes is sufficient to deter others from engaging in a like course of conduct.

> The Court instructs the jury that the fact that instructions have been given to you on the subject of damages should not be perceived by you as an intimation on the part of the Court that the defendant is or is not liable for the injuries and damages alleged. Such liability is to be determined solely by your own findings and from the evidence and the law as incorporated in these instructions.
>
> The Court instructs the jury that the mere fact that plaintiffs instituted this lawsuit against the defendants is not the slightest evidence of entitlement to recover a favorable verdict against any of them, nor does the filing of this lawsuit create any presumption favorable to plaintiffs or even a suspicion that any given one, or any of the defendants, may be liable to them.

(Judge's Charge to Jury, Nov. 8, 1990 at p. 13).

The two juries returned verdicts against Keene in thirty (30) out of the thirty-three (33) cases in which Keene remained a defendant. The amounts of the compensatory damages awarded by the juries varied with the extent of each Plaintiff's injuries, from $15,000 to $324,000. In nine (9) cases, the compensatory damages awarded were offset by settlements with other defendants.

The juries also awarded punitive damages. The jury in the group before Judge Starcher awarded punitive damages against Keene in the amount of $5,000 per Plaintiff and against the other defendant that went to verdict in the amount of $30,000 per Plaintiff. The jury in the group before Judge Stone awarded no punitives against

Keene, but awarded $250,000 per Plaintiff against the other defendant.

The statement of the case in Keene's Petition for a Writ of Certiorari is interesting in what it fails to state. Keene does not argue that there was insufficient evidence of punitive damages, or that the trial courts refused to permit it to introduce any evidence relevant to the issue of punitive damage, or that the courts below erred in permitting Plaintiffs to introduce their evidence of punitive damages. Indeed, the type of facts that might have been relevant to the jury's consideration or to the trial courts' post-trial review were saved for footnotes in the Petition for a Writ of Certiorari. Keene also does not complaint of any defect in the instructions to the jury.

In fact, Keene does not complain of any procedural deficiencies except that the issue of punitive damages should not have been submitted to the jury at all. The arguments set forth in Keene's Petition for a Writ of Certiorari, however, were set forth in its Motion to Strike Punitive Damages and post-trial motions, which were considered and denied by the trial courts.

After the trial courts entered judgments, Keene filed a Petition for Appeal in the Supreme Court of Appeals of the State of West Virginia on September 18, 1991, with the trial court record accompanying the Petition. (A-101). Plaintiffs filed a lengthy response. Under W.Va.R.A.P. 5, Keene, as the Petitioner, had an opportunity to make an oral presentation, but the Plaintiffs had no such opportunity. (Respondents' Appendix at 6). Upon consideration of the foregoing, the West Virginia Court refused the Petition for Appeal on May 13, 1992. (A-101 – A-102).

Thereafter, Keene filed a Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The major argument in the Petition for a Writ of Certiorari arising from a group of asbestos cases tried in a West Virginia state court is that multiple punitive damage awards against a defendant violates due process. This argument has been repeatedly rejected by this Court in cases raising precisely the same circumstances as the instant Petition.

In *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991), this Court clearly stated that punitive damages are governed by state law. The purpose of punitive damages under West Virginia law are to punish the defendant, to deter others from engaging in similar conduct, to promote settlements, to provide additional compensation to the plaintiff, to encourage litigation and to substitute for personal revenge. When a company profits from the mass-marketing of defective products which cause injury and death to thousand of victims, the West Virginia courts have recognized the propriety of multiple punitive damage awards. *See Davis v. Celotex*, 1992 WL 130567 (W.Va. June 12, 1992).

There is no dispute that the evidence of punitive damages was sufficient. Even if Petitioner's arguments had merit, it was not denied the opportunity to make those arguments and to present relevant evidence to the jury and to the trial court. In short, having declined the

opportunity to introduce evidence that it had been punished enough by prior verdicts, Petitioner cannot seek to rectify its own failures at trial in this Court.

Not only do the punitive damages awarded against Petitioner comport with relevant state law, the process by which those damages were assessed and reviewed satisfy the demands of procedural due process. The charge to the jury explained the purposes of punitive damages under West Virginia law and instructed the jury on all relevant factors for which evidence had been introduced. The post verdict review process provided Petitioner the opportunity to argue the propriety of the punitive damage awards and to present additional evidence. The Petition for Appeal to the West Virginia Supreme Court was far from perfunctory, and involved extensive briefing and the opportunity for oral argument on the issue.

In short, punitive damage awards of $5,000 per plaintiff in a case where compensatory damages ranged from $15,000 to $324,000 raises neither substantive nor procedural due process problems, and this Court should deny the Petition for a Writ of Certiorari.

ARGUMENT

I. The Propriety Of Multiple Punitive Damage Awards Against A Defendant Who For Years After Knowledge Of The Defect Mass Markets Defective Products Is A Matter Of State Substantive Law.

Buried on page 43 of Keene's Petition for a Writ of Certiorari is the sole basis on which Keene urges this Court to accept review: "the mere fact that Keene was

assessed punitive damages twenty-one times in the same trial for the same course of conduct violates Keene's due process rights." This argument repeatedly has been raised in asbestos cases appealed to this Court, which has properly denied review. *See, e.g., Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied sub nom. Celotex Corp. v. Glasscock*, 112 S. Ct. 1778 (1992); *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied sub nom. Celotex Corp. v. King*, 111 S. Ct. 2236 (1991); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir.), *cert. denied sub nom. Pittsburgh Corning Corp. v. Simpson*, 111 S. Ct. 27 (1990); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied sub nom. Celotex Corp. v. Johnson*, 111 S. Ct. 297 (1990); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986).

Punitive damages have long been a part of traditional state tort law. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1041 (1991); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Although defendants have mounted repeated federal attacks on this aspect of state law, these attempts have been firmly rejected by this Court. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259-60 (1989) (Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages awarded in civil cases between private parties); *United States v. Halper*, 490 U.S. 435, 450-51 (1989) (Double Jeopardy Clause of Fifth Amendment is not triggered by civil litigation between private parties). The awards of punitive damages in these tort cases under state law further the purposes of punitive damages under a long line of

West Virginia appellate cases, and this Court need not address Keene's objection raised in its Petition for a Writ of Certiorari.

A. The Awards Of Punitive Damages In These Cases Furthered The Purposes Of Punitive Damages Under West Virginia Law.

Haslip reaffirmed the longstanding principle expressed in *Silkwood* that punitive damages are a part of traditional state tort law. The Court described at length the case law upholding the well-established common law method for assessing punitive damages, and recognized that the Fourteenth Amendment to the Constitution was not intended to overturn the prevailing method. *Haslip*, 111 S. Ct. at 1043 (citing *Burnham v. Superior Court of California*, 495 U.S. 604 (1990); *Day v. Woodworth*, 13 How. 363, 14 L. Ed. 181 (1852)).

Refusing to "draw a mathematical bright line between the constitutionally unacceptable that would fit every case," the Court reviewed the process by which punitive damages were assessed by the jury in the case before it, the post-trial procedures for scrutinizing punitive awards and the review provided by the Alabama Supreme Court, and rejected Pacific Mutual's challenge under the Due Process Clause of the Fourteenth Amendment.

In reviewing the jury's assessment of punitive damages against Pacific Mutual, Justice Blackmun did not require that punitive damages serve a particular purpose. Rather, he recognized the purposes of punitive damages under Alabama law. Because the jury instructions in

Haslip expressly described the nature and purpose of punitive damages under the relevant State law, identified the damages as punishment for civil wrongdoing and explained that their imposition was not compulsory, the instructions reasonably accommodated Pacific Mutual's interest in rational decision making and the state's interest in meaningful individualized assessment. Since the jury exercised its discretion with reasonable constraints, due process was satisfied. *Haslip*, 111 S. Ct. at 1044.

The Court also concluded that the trial court's scrutiny of the award post-trial, considering factors such as the culpability of the defendant's conduct,the desirability of discouraging others from similar conduct, the impact upon the parties and the impact on innocent third parties, ensured meaningful and adequate review by the trial court. *Id.*

The Court further regarded appellate review as providing an additional check on the jury's or trial court's discretion. Recounting the factors that the Alabama Supreme Court considers in determining whether the award was excessive or inadequate, the Court concluded that appellate review makes certain that punitive damages are reasonable in their amount and rational in light of their purpose. In particular, the Court regarded the appellate court's post-verdict review as ensuring that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages.

Thus, it was important to the Court's conclusion in *Haslip* that the award furthered the purposes of punitive damages as described in the decisional law of the state.

The purposes of punitive damages under West Virginia Law were recently described by the Supreme Court of Appeals of West Virginia in *Fleming Landfill v. Garnes*, 186 W. Va. 656, 413 S.E.2d 897 (1991), on remand from *Fleming Landfill v. Garnes*, 111 S. Ct. 2882 (1991). In *Garnes* the West Virginia Court, like this Court, recognized the longstanding history of punitive damage awards and noted that no one (except perhaps a few academic commentators) questions the value of punitive damages as a deterrent to discourage bad acts, as an economic incentive to exercise greater care, and as encouraging good faith efforts at settlement.

Approximately six months later, the West Virginia Supreme Court reviewed a punitive damage award against an asbestos defendant in another case before one of the trial judges who presided at the cases below. In *Davis v. Celotex Corp.*, 1992 WL 130567 (W. Va. June 12, 1992), the Court in a written opinion rejected precisely the same issues raised by Keene.

In *Davis*, the Court amplified the reasons for awarding punitive damages expressed in *Garnes*: "(1) to punish the Defendant; (2) to deter others from pursuing a similar course; and (3) to provide additional compensation for the egregious conduct to which the Plaintiff has been subjected." *Davis*, 1992 WL 130567 at *2 (quoting *Harless v. First National Bank in Fairmont*, 169 W. Va. 673, 691, 289 S.E.2d 692, 702 (1982), and citing *Jarvis v. Modern Woodmen of America*, 185 W. Va. 305, 406 S.E.2d 736 (1991)). In addition, the possibility of recovering punitive damages can encourage a plaintiff to bring an action where he might be discouraged by the costs and inconvenience of the action and can also serve as a substitute for personal

revenge. *Davis*, 1992 WL 130567 at *2. The Court concluded that when an asbestos manufacturer has actual or constructive knowledge of the severe health hazards caused by a product and continues to manufacture and distribute that product, the manufacturer may be found liable for punitive damages to those injured by the product. *Id.* at *4. The Court also held that a successor corporation may be found liable for punitive damages for liability incurred by the predecessor company in its manufacture of defective products. *Id.* at *7.

Of particular interest to the instant Petition is the *Davis* Court's discussion of the defendant's argument that multiple punitive damage awards are fundamentally unfair under the Due Process Clause. The Court refused to decide the question as a matter of law. Noting that the defendant failed to present its concerns to the jury by introducing evidence of the prior punitive damage awards and arguing that it had been sufficiently punished, the West Virginia Court concluded that when the record fails to set out sufficient facts to answer the question of whether substantive due process has been violated by multiple punitive damage awards in asbestos cases, the Court will decline to address the issue.

When held against the backdrop of West Virginia law, it is clear that the punitive damages awarded against Keene further the purposes of such awards under West Virginia law. Keene profited from the mass-marketing of its asbestos-containing products which tragically caused injury and death to thousands of individuals, including the Plaintiffs.

Multiple punitive damage awards serve to encourage manufacturers to take steps to make their products safer and deter manufacturers from factoring the cost of a single punitive damage award into the cost of its product and accepting the risk of marketing a product paying limited punitive damages. If only a single punitive damage award were permitted, such assessment would occur before the full extent of the threat of harm caused by wrongdoer were known.

Punitives are particularly important in asbestos cases involving multiple defendants to encourage good faith efforts at settlement. Defendants' wrongful conduct continued for many years after knowledge of the defect and injured many victims. Nonetheless, many of the compensatory damage awards against Keene were offset by settlements with other defendants in accordance with *Board of Education v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 390 S.E.2d 796 (1990). There are no offsets against punitives. If there were no punitive damage awards, defendants who refused to settle might never be required to pay for the harm caused by their defective products.[1]

---

[1] Footnotes 10-11 of Keene's Petition misrepresent the state of the law regarding punitive damages. Although some courts have expressed concerns from time to time, Keene cites no case that has ever held that multiple awards of punitive damages violate due process. Indeed, *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967), *limited in Morrissey v. National Maritime Union of America*, 544 F.2d 19 (2d Cir. 1976), cited by Keene, reversed the award of punitive damages not because of the reasons set forth in Footnote 10, but because there was insufficient evidence of misconduct, a problem not present in the instant case. Further, the court that decided *Roginsky* recently rejected the same challenges to an award of punitive damages in

In the criminal context, West Virginia has recognized that when a single act results in multiple deaths, Article III, Section 5 of the West Virginia Constitution permits multiple punishments, and criminal defendants may receive as many sentences as there were deaths. *State v. Fortner*, 182 W. Va. 345, 387 S.E.2d 812, 826 (1989); *State ex rel. Lehman v. Strickler*, 174 W. Va. 809, 329 S.E.2d 882 (1985); *State v. Myers*, 171 W. Va. 277, 298 S.E.2d 813 (1982). Certainly in the civil context, when a manufacturer's product causes death and injury to many people, multiple punitive damage awards are proper.

Thus, the West Virginia Supreme Court has held that multiple punitive damages are proper in precisely the

---

an asbestos case as Keene raises. *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d at 280-81; *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied*, 111 S. Ct. 297 (1990); *Racich v. Celotex Corp.*, 887 F.2d 393 (2d Cir. 1989). It would be unjust to deny a plaintiff's legitimate claim for punitive damages merely because many others were also injured by a defendant's product. In fact, the more individuals a tortfeasor injures by outrageous conduct, the more the tortfeasor should be punished. Given the great potential for harm by widely distributed defective products, a potential that materialized in these cases, multiple punitive damage awards are justified. *Jackson*, 781 F.2d at 407.

Further, no case has ever adopted the reasoning set forth in Footnote 11 of Keene's Petition that the manufacture and distribution of asbestos-containing products was a single continuous course of conduct for which multiple awards of punitive damages are improper. Rather, many cases have held that it was *improper* to conclude that the punitive damages awarded in one case involved the same misconduct as in other cases. *See, e.g., Simpson*, 901 F.2d at 281; *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272 (D.N.J. 1989).

same circumstances as are presented here. Indeed, the awards against Keene further the purposes of such awards under West Virginia law. Since its decision in *Haslip*, the Court has refused to review multiple punitive damage awards in asbestos cases. *See Glasscock, supra.* This Court must not interfere with the development of substantive state tort law, and must deny Keene's Petition for a Writ of Certiorari.

B. Even If Evidence Of Multiple Punitive Damage Awards Is Relevant To The Consideration Of The Jury And The Trial Court, Petitioner Was Not Denied The Opportunity To Present Evidence Of Such Awards.

Throughout its Petition for a Writ of Certiorari, Keene suggests that it has insufficient assets to pay multiple punitive damage awards, and cites law review articles, general periodical literature, studies by the Rand Corporation Institute for Civil Justice and the American Trial Lawyers Association and a host of "facts" from sources not in the trial court record.

West Virginia has a mechanism for addressing these concerns. In *Garnes*, the West Virginia Supreme Court advanced the three general criteria for awards of punitive damages expressed by this Court in *Haslip*:

> (1) a reasonable constraint on the jury's discretion; (2) a meaningful and adequate review of the award by the trial court using established procedures; and (3) a meaningful and adequate review by the appellate court.

Garnes, 413 S.E.2d at 907.

More specifically, the West Virginia court stated that the jury ought to consider the factors set forth in *Haslip*, 111 S. Ct. at 1045, but recognized that all of the factors need not be given to the jury because the jury will not possess all of the information necessary to use the factors properly. *Garnes*, 413 S.E.2d at 909. Briefly, these factors are: (1) punitive damages should bear a reasonable relationship to the harm that occurred or is likely to occur; (2) the reprehensibility of the defendant's conduct; (3) the profitability of defendant's wrongful conduct; (4) punitive damages should bear a reasonable relationship to compensatory damages; and (5) the financial position of the defendant. *Id.* In *Garnes*, the Court reversed the award of punitive damages because the jury awarded punitives without finding any compensatory damages, contrary to factors (1) and (4). *Id.* at 908.

Garnes also described the trial court's role post-verdict. The trial court's review of an award of punitive damages should consider all of the *Haslip* standards and, in addition, should consider the appropriateness of punitive damages to encourage fair and reasonable settlements. *Garnes*, 413 S.E.2d at 908.

The West Virginia Court also confirmed its role on appellate review:

> Upon petition, this Court will review all punitive damage awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the

> trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.

Syllabus Point 5, *Garnes*, 413 S.E.2d at 900, 910. The role of the appellate court was reiterated in *Davis v. Celotex*, 1992 WL 130567 at *10.

Although *Garnes* and *Davis* were decided prior to the trial of these cases, Keene has failed to demonstrate that the procedures described in those cases were not followed. For example, Keene does not complain that it was deprived of the opportunity to present evidence of other punitive damage awards or of its financial condition to the jury. If the trial courts did not instruct the juries on these factors, it was because the jury did not possess information necessary to use the factors properly because Keene did not offer such information. Keene filed post trial motions, and the West Virginia Supreme Court reviewed the awards on Keene's Petition for Appeal. The Petition for Appeal did not address each and every factor with particularity nor did it summarize its evidence on these factors, because there was none. Unlike *Garnes*, in which no compensatory damages were awarded, the punitives awarded against Keene were a small fraction of the compensatory damages. Therefore, the West Virginia Supreme Court found no basis to review the case and refused Keene's Petition for Appeal.

Keene awaits its Petition for Writ of Certiorari in this Court to present information (which is *not* even in the form of admissible evidence) that it wished the jury to consider in mitigation of punitive damages. Federal courts have properly rejected this tactic. A party who has

failed to avail itself of the opportunity to present relevant evidence cannot seek to rectify its own failure in the appellate court. *See, e.g., Simpson v. Pittsburgh Corning Corp.*, 901 F.2d at 280-82; *Dunn v. Owens-Corning Fiberglas*, 774 F. Supp. 929, 946 (D.V.I. 1991).

C. Multiple Punitive Damages Do Not Violate Due Process In These Cases.

The jury's award of multiple punitive damages awards against Keene was proper under West Virginia substantive law. Although the argument has been repeatedly raised, no court has ever held that such awards violate substantive due process. *See, e.g., Simpson, supra; Johnson, supra; Racich v. Celotex Corp.*, 887 F.2d 393 (2d Cir. 1989). The reasons are simple: it would be unjust to deny a plaintiff's legitimate claim for punitive damages merely because many others were also injured by a defendant's product. Given the great potential for harm by widely distributed defective products, a potential that materialized in these cases, multiple punitive damage awards are justified. *Jackson*, 781 F.2d at 407. Accordingly, all federal courts that have considered the question have held that it is *improper* to conclude that the punitive damages awarded in one case involved the same misconduct as in other cases. *See, e.g., Simpson*, 901 F.2d at 281; *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272 (D.N.J. 1989).

A total punitive damage award of $105,000 divided among 21 plaintiffs (many of whom were awarded large compensatory damage awards that Keene did not pay due to the Plaintiffs' fortuitous settlements with others)

comports with West Virginia law and does not raise any substantive constitutional problems. This Court has properly refused to entertain objections to punitive damage awards based on vague appeals to constitutional principles, *see Bankers Life & Casualty Co. v. Crenshaw, supra,* and should do so in these cases.

II. The Post Trial And Appellate Review In These Cases Satisfied The Demands Of Due Process.

As discussed above, this Court in *Haslip* held that the jury instructions, together with Alabama's post-trial and appellate review procedures, satisfied the demands of due process. In *Garnes* and *Davis,* the West Virginia Supreme Court clarified the role of the trial court and its own role in reviewing punitive damage awards.

Although the verdicts in the instant cases were rendered prior to the decisions in *Haslip* and *Garnes,* the proceedings below followed the procedures and standards clarified in those decisions.

The courts' instructions, set forth in the Statement of the Case, placed reasonable constraints on the jury's discretion and did precisely what this Court held would satisfy due process in *Haslip.* The trial courts instructed the juries that the purpose of punitive damage is to punish a defendant and deter others from pursuing a like course of conduct. Further, the instruction made clear that punitive damages were to punish the defendant for "gross fraud, malice, oppression, or wanton, willful or reckless misconduct or criminal indifference to the civil

obligations affecting the rights of others." The instructions also explained that the imposition of punitive damages is not compulsory.

Thus, there was no significant difference between the instructions given here and the one approved by the Supreme Court in *Haslip*. The instructions confined the jury's discretion to deterrence and retribution, the West Virginia policy concerns. The instructions did not specifically describe certain factors, such as the profitability to Defendants of their wrongful conduct, Defendants' financial position or the costs of litigation. However, Keene did not offer evidence of these factors, and were not denied the opportunity to do so. In fact, evidence of these factors would likely have prejudiced Keene, and under such circumstances, the trial court would have been obligated to keep such evidence from the jury.

Further, as concluded by the Court in *Davis*:

> In sum, we hold that in cases tried before *Garnes* in which punitive damages were awarded, we will not set aside such awards if there is a factual basis for the punitive damages, if the punitive damages bear a reasonable relationship to the compensatory damages, and if the parties' main assignment of error is that the trial court's instruction did not contain all of the factors enunciated in *Garnes*.

Davis, 1992 WL 130567 at *10.

Thus, the mere fact that the trial court's instruction did not contain all of the *Garnes* language did not amount to a denial of due process. Given that Keene's conduct was egregious enough to impose punitive damages and the ratio between the compensatory and punitive damage

awards is not unreasonable, the Court declined to set aside the award. The jury was capable of accommodating Keene's interest in rational decision making and the state's interest in meaningful, individualized assessment in that the jury differentiated between the egregiousness of Keene's conduct and the other defendants who went to verdict, and awarded punitive damages in different amounts. The "across-the-board" damages awarded against Keene were reasonable because Keene's misconduct was similar, although often repeated, with respect to all Plaintiffs who were injured by Keene's products. The punitives of $5,000 per Plaintiff were less than any compensatory damage award and bear a reasonable relationship to the serious harm caused.

The fact that the jury in Judge Stone's courtroom awarded no punitives against Keene does not implicate any due process concerns. There is nothing precise in a jury determination of damages, and the unpredictability of litigation encourages good faith efforts at settlement, an important reason that the West Virginia courts maintain the viability of punitive damages. *See Garnes*, 413 S.E.2d at 904. In fact, to reverse the award of punitive damages would send the wrong message. Keene refused to settle its cases, and the compensatory damages awarded against it were, in many cases, offset by Plaintiffs' settlements with other defendants. To reverse the punitive damage award against a wrongdoer who is not required to pay compensatory damages due to fortuitous settlements with others would discourage settlements in multiple defendant cases.

The review by the trial courts was also adequate and meaningful. Keene submitted post-trial motions that

forced the trial courts to consider a number of factors, such as the relationship between the compensatory and punitive damages and the possibility of multiple punitive damage awards. Keene was free to argue the applicability of such relevant standards and to present evidence on them, but having failed to avail itself of the opportunity, cannot complain of its own failure to this Court.

The Petition for Appeal to the West Virginia Supreme Court provided the "additional check" on the discretion of the jury and trial court deemed important by this Court in *Haslip*. The parties presented substantial briefs to the appellate court, and Keene, but not the Plaintiffs, had the opportunity to present oral argument. *Davis* makes clear that the West Virginia Supreme Court will allow an appeal that raises issues warranting closer scrutiny. However, the West Virginia Supreme Court refused the petition for appeal in the instant case because it correctly concluded that Keene presented no issue that required further review.

To require an appellate court to automatically review all cases awarding punitive damages, as Keene suggests, would discourage settlements and increase the cost of litigation, contrary to the purpose of such awards. Thus, the West Virginia Supreme Court's refusal to prolong the litigation process was in keeping with the important public policies recognized in its case law.

CONCLUSION

The multiple punitive damages awarded against the product manufacturer in these cases further the purposes of punitive damages under applicable state law. Petitioner had every opportunity to introduce relevant evidence. The state trial and appellate courts provided adequate and meaningful review. The punitive damages awarded against Petitioner comport with the demands of due process, and this Court must deny the Petition for a Writ of Certiorari.

Respectfully submitted,

TYBE A. BRETT, Esquire
Counsel of Record
THEODORE GOLDBERG, Esquire
HENDERSON & GOLDBERG, P.C.
1030 Fifth Avenue
Pittsburgh, PA 15219
(412) 471-3980

SCOTT S. SEGAL, Esquire
SEGAL & DAVIS
810 Kanawha Blvd., East
Charleston, WV 25301
(304) 344-9100

Attorneys for Respondents

Dated: September 14, 1992

RULES OF APPELLATE PROCEDURE WEST VIRGINIA SUPREME COURT OF APPEALS

Rule 3. Petition for Appeal. (a) *Time for Petition.* No petition shall be presented for an appeal from, or a writ of supersedeas to, any judgment, decree or order, which shall have been rendered more than four months before such petition is filed in the office of the clerk of the circuit court where the judgment, decree or order being appealed was entered, whether the State be a party thereto or not; provided, that the judge of the circuit court may for good cause shown, by order entered of record prior to the expiration of such period of four months, extend and re-extend such period, not to exceed a total extension of two months, if a request for the transcript was made by the party seeking an appeal or supersedeas within thirty days of the entry of such judgment, decree or order. In appeals from administrative agencies, the petition for appeal shall be filed within the applicable time provided by the statute.

(b) *Notice for Criminal Appeal.* No petition from a criminal case shall be presented unless a notice of intent to appeal shall have been filed with the clerk of the court in which the judgment or order was entered within thirty days from the entry of such judgment or order. The notice of intent to appeal shall concisely state the grounds for appeal.

(c) *Form of Petition.* The petition for appeal and note of argument under prior practice shall be integrated into one document called the petition. A petition for an appeal shall state the following in the order indicated:

1. The kind of proceeding and nature of the ruling in the lower tribunal.

2. A statement of facts of the case.

3. The assignments of error relied upon on appeal and the manner in which they were decided in the lower tribunal.

4. Points and authorities relied upon, a discussion of law, and the relief prayed for.

(d) *Joint or Consolidated Appeals.* If two or more persons are entitled to appeal from a judgment or order of a lower tribunal and their interests are such that joinder may properly be made, they may join in petitioning for an appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the Supreme Court upon its own motion, or upon motion of a party, or by stipulation of the parties to the several appeals.

(e) *Service of Petition.* The petition for appeal shall be served in accordance with Rule 15.

(f) *Response to Petition.* When the appeal is from a judgment, order or decree of a circuit court, the respondent may file seven copies of a response with the Clerk of the Supreme Court within thirty days after the filing of the petition for appeal in the office of the clerk of the circuit court. When the appeal is from another tribunal, the respondent may file seven copies of a response with the Clerk of the Supreme Court within thirty days after the filing of the petition for appeal with the Clerk of the Supreme Court. (As amended by order entered November 29, 1989, effective January 1, 1990, by order entered

June 26, 1990, effective July 1, 1990, and by order entered December 13, 1990, effective March 1, 1991.)

Rule 4. Presentation of Petition. (a) *Filing with Clerk.* When the appeal is from an order of the circuit court, eight copies of the petition for appeal shall be filed in the office of the clerk of the circuit court where the judgment, decree or order being appealed was entered. The circuit clerk shall note on each copy the date on which the petition for appeal was filed. There shall be attached to the original petition a memorandum of all parties who have appeared in the action from which the appeal is sought, together with the names and addresses of their counsel of record, if any.

(b) *Transmission to the Supreme Court.* The circuit clerk shall retain one copy of the petition and, within twenty days from deposit of money or bond for costs under subparagraph (d), shall transmit seven copies of the petition, along with the trial court record as designated in paragraph (c), to the Clerk of the Supreme Court by United States certified mail.

(c) *Record on Petition.* The appellant shall designate by itemization to the clerk of the circuit court such pleadings, orders and exhibits to enable the Supreme Court to decide the matters arising in the petition:

(i) In lieu of filing all or part of the transcript of testimony the petitioner may file under Rule 4A, in which event he may rely on the facts stated in his petition, or

(ii) If the petitioner desires he may cause to be prepared, pursuant to the provisions of Rule 80 of the West Virginia Rules of Civil Procedure, a transcript of such part of the proceedings not already on file as he deems necessary for inclusion in the record.

The circuit clerk, before transmitting the record to the Supreme Court, shall arrange the papers, as nearly as possible, in chronological order of filing, shall number the pages, shall make and certify copies of all orders entered in the case which are not in the files, and shall prepare a table of contents or index.

(d) *Bond for Costs.* Before such petition and record are transmitted, the petitioner shall deposit with the clerk of the circuit court sufficient money, or a bond conditioned to pay the same, in a penalty and with sureties to be fixed and approved by such clerk, to pay: (1) the expenses of preparing and indexing the record; (2) fees for filing the petition and certifying necessary copies of orders; (3) costs of transmission and return of the record; and (4) costs of the making of the transcript. The clerk shall endorse on the petition that such deposit has been made or such bond fixed. (As amended by order entered November 29, 1989, effective January 1, 1990.)

Rule 4A. Presentation of Petition Without Transcript of Testimony. (a) *Purpose.* In order to provide an inexpensive and expeditious method of appeal, a petitioner may file his petition without the transcript of testimony taken in the lower court.

(b) *Filing with Circuit Court.* Eight copies of the petition shall be filed in the office of the clerk of the circuit where the judgment or order being appealed was entered within sixty days from the date of entry of the judgment of order. Two additional copies of the petition shall be served upon each party to the action being appealed, as provided in Rule 15, and such parties shall have thirty days to file a reply petition with the clerk of the circuit court. The respondent shall not be entitled to an oral argument under rule 5.

(c) *Record on Petition.* The petitioner shall designate by itemization to the clerk of the circuit court so much of the pleadings, orders and exhibits in the case as will enable the Supreme Court to decide the matters arising in the petition. In lieu of filing all or part of the transcript of testimony, the petitioner shall set out in the petition a statement of all facts pertinent to the issues he raises. The petition shall include a certificate by the petitioner's attorney that the facts alleged are faithfully represented and that they are accurately presented to the best of his ability. The use of the abbreviated procedure, set forth in this Rule 4A, places the highest possible fiduciary duty upon a lawyer with regard to the court and intentional misrepresentation of any sort is grounds for disciplinary action.

(d) *Transmission to the Supreme Court.* The circuit clerk shall retain in his office one copy of the petition. He shall, at the end of thirty days from the date the petition was filed under paragraph (b), supra, or after respondent has filed a reply petition, whichever occurs first, transmit by certified mail to the Clerk of the Supreme Court seven

copies of the petition. The circuit clerk, before transmitting the record to the Supreme Court, shall arrange the papers, as nearly as possible, in chronological order of filing, shall number the pages, shall make and certify copies of all orders entered in the case which are not in the files, and shall prepare a table of contents or index.

(e) *Bond for Costs.* Before such petition and record are transmitted to the Supreme Court, the petitioner shall deposit with the clerk of the circuit court sufficient money, or a bond conditioned to pay the same, in a penalty and with sureties to be fixed and approved by such clerk, to pay: (1) the expenses of preparing and indexing the record; (2) fees for filing the petition and certifying necessary copies of orders; (3) costs of transmission and return of the record. The clerk shall endorse on the petition that such deposit has been made or such bond filed.

Rule 5. Hearing on Petition. (a) *Time for Hearing.* Within thirty days from the date of receipt of the petition and record by the Clerk of the Supreme Court, counsel may request oral presentation on the petition on any regularly scheduled motion day thereafter. Such request shall be made to the Clerk of the Supreme Court in writing or by telephone. Oral presentation will be heard in the order in which such requests were made. Oral presentation will not be heard, except upon motion for good cause shown, prior to expiration of the period allowed for filing a response as provided in Rule 3(f).

(b) *Oral Presentation.* Oral presentation shall be limited to ten minutes, unless additional time is granted by the Court.

(c) *Waiver of Oral Presentation.* At any time after the transmission of the petition and record to the Clerk of the Supreme Court in accordance with Rule 4A(d), counsel may inform the Clerk in writing that an oral presentation is not desired, in which case the petition will be considered by the Court in chambers. (As amended by order entered December 13, 1990, effective March 1, 1991.)

* * *

Rule 7. Rejection or Allowance of Appeal. (a) *Rejection.* If the petition for appeal is rejected by the Supreme Court on the ground that the judgment or order is plainly right, no other petition for appeal from that judgment or order shall be permitted. If the petition for appeal is rejected on any other ground, or if no ground be cited in the rejection, the petitioner may renew the petition as many times as he desires during the period prescribed by law for presentation of petitions.

(b) *Renewal of Petition.* A petitioner desiring to renew a petition may notify the Clerk of the Supreme Court of his intention in writing within thirty days after the entry of the order denying his application. In such case, the Clerk shall retain the petition and record in the Supreme Court, the petition may be reheard in accordance with Rule 5, and an amended petition or supplemental argument may be filed.

If the Clerk of the Supreme Court receives no timely notice of the petitioner's intention to renew, he shall return the record to the circuit clerk, who shall repay the petitioner any money deposited under Rule 4(d) or Rule 4A(e), in excess of fees and expenses.

(c) *Allowance.* If the petition for appeal is granted:

(1) The Clerk of the Supreme Court shall docket the same and immediately send a copy of the order granting the appeal to the petitioner's counsel, or, if there is no counsel of record, to the petitioner, and to the clerk of the circuit court, who shall retain the same in his records.

(2) The Clerk of the Supreme Court shall forthwith return the record to the clerk of the circuit court for preparation of the record of the case for appeal in accordance with Rules 8 and 9.

(3) The Clerk of the Supreme Court shall then issue summons against all parties appearing of record, other than the petitioner, that they may be heard, and shall also issue any supersedeas which may have been awarded. The Clerk of the Supreme Court shall serve the summons upon the parties by mailing the same to the counsel of record for each party, or if there is no counsel of record, to the party at his last known address. Service shall be complete upon mailing. The Clerk of the Supreme Court shall note upon the docket the names of the parties to whom the summonses were mailed, with the date of mailing.

(4) The Court may grant a supersedeas or modify the conditions thereof, in accordance with rule 6.

No. 92-359

Supreme Court, U.S.
FILED
SEP 22 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

—v.—

LEONARD ADAMS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

STUART E. RICKERSON
Vice President–
General Counsel
Keene Corporation
200 Park Avenue
New York, New York 10166
(212) 557-1900

ANDREW T. BERRY
Counsel of Record
GITA F. ROTHSCHILD
McCARTER & ENGLISH
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(201) 622-4444

Attorneys for Petitioner,
Keene Corporation

BEST AVAILABLE COPY

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES i

STATEMENT OF THE CASE 1

ARGUMENT

I. THIS COURT MUST REVIEW THE REPETITIVE PUNITIVE DAMAGES VERDICTS IN THESE CASES UNDER THE CONSTITUTIONAL STANDARDS ESTABLISHED IN PACIFIC MUTUAL LIFE INS. CO. v. HASLIP 5

II. THE PUNITIVE DAMAGES AWARDED IN THESE CASES CANNOT WITHSTAND CONSTITUTIONAL SCRUTINY AND MUST BE REVERSED 10

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

	Page
Davis v. Celotex Corp., 1992 WL 130567 (W. Va.)	6, 7
Farr v. Pitchess, 409 U.S. 1243 (1973)	5
Fleming Landfill, Inc. v. Garnes, ___ U.S. ___, 111 S. Ct. 2882 (1991)	17
Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991)	3, 7, 9, 12, 17, 18
Green Oil Co. v. Hornsby, 539 So.2d 218 (Ala. 1989)	16
Haga v. King Coal Chevrolet Co., 150 S.E.2d 599 (W.Va. 1966)	9
Johnson v. Celotox Corporation, 899 F.2d 1281 (2d Cir. 1990) cert. denied, 111 S. Ct. 297 (1990)	6
Johnson v. Hugo's Skateway, 1992 WL 213940 (4th Cir. (Va.))	10
Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950)	5

Pacific Mutual Life Insurance Co. v. Haslip, ___ U.S. ___, 111 S. Ct. 1032 (1991) . . . . . *passim*

Racich v. Celotex Corp., 887 F.2d 393 (2d Cir. 1989) 6

Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2d Cir. 1990) cert dismissed, 111 S. Ct. 27 (1990) 6

Wells v. Smith, 297 S.E.2d 872 (W. Va. 1982) 17

MISCELLANEOUS

Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 Cardozo L. Rev. 1819 (1992) . . . 15

Schwarzer, Punishment Ad Absurdum, 11 Cal. Law. 116 (Oct. 1991) 15

STATEMENT OF THE CASE

There is no legitimate constitutional basis to justify the continued imposition of punitive damages in these, or any other, asbestos cases. Plaintiffs' Response to Keene's Petition does not undercut the need for Supreme Court review. Instead, plaintiffs offer the mantra of oft-repeated traditional justifications for punitive damages in other kinds of products liability cases - justifications that were long ago stripped of any validity by the enormity of present day asbestos litigation.

This Court has *never* considered the constitutional implications of multiple punitive damages awards for the same course of conduct. This Court has *never* addressed the issues uniquely raised by a mass litigation that dwarfs anything

previously encountered or even contemplated by this Court. This Court has *never* held that, despite bankruptcies, hundreds of millions of dollars in awards, billions of dollars in payments and more than 200,000 cases, further punishment is still needed.

None of the lower courts which have addressed the issue of repetitive punitive damages in asbestos litigation to date have had the benefit of Pacific Mutual Life Ins. Co. v. Haslip, ___ U.S. ___, 111 S.Ct. 1032 (1991) which provides the necessary constitutional framework within which to evaluate these issues.

Haslip firmly established that punitive damages awards must be examined under federal constitutional standards. They are not purely a matter for consideration under state law. Had this or any other court undertaken such an

examination, the inescapable conclusion would have been that continued punitive damages awards in asbestos cases violate defendants' due process rights.

Without explanation, the punitive damages verdicts in these cases were not properly reviewed by either the trial court or the West Virginia Supreme Court of Appeals, despite the latter court's ruling in Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991). Plaintiffs use terms such as "described", "confirmed" and "clarified" to characterize the holding in Garnes, in an effort to obscure the outright declaration by the Garnes court that the West Virginia punitive damages scheme - the same scheme under which the punitive awards were made in these cases - violated defendants' due process rights.

In contravention of the explicit mandate of both Haslip and Garnes, neither of the reviewing courts took new evidence or examined the type of additional facts necessary for proper review of the verdicts. Indeed, the review procedures in place at the time foreclosed consideration of any such additional evidence. Keene properly preserved the arguments raised in this petition before both the trial court and the appellate court.

The meritless, and sometimes disingenuous, arguments raised by plaintiffs must not dissuade this Court from this long overdue analysis of the constitutional implications of repetitive punitive damages awards in asbestos-related mass tort litigation. Keene's Petition for Certification must be granted.

ARGUMENT

I.

THIS COURT MUST REVIEW THE REPETITIVE PUNITIVE DAMAGES VERDICTS IN THESE CASES UNDER THE CONSTITUTIONAL STANDARDS ESTABLISHED IN PACIFIC MUTUAL LIFE INS. CO. v. HASLIP.

This Court has never considered the issue of the constitutionality of repetitive punitive damages in the mass tort context.[1] Plaintiffs cannot offer one case in which the unique question of the due process limitations on repetitive

---

[1] Plaintiffs suggest that "[t]his argument has been repeatedly rejected by this Court in cases raising precisely the same circumstances as the instant Petition." Pb 5. In support of this proposition, plaintiff cites five Circuit Court decisions, *each of which this Court declined to review.* Pb 7. This Court repeatedly has admonished that a "denial of certiorari imparts no implication or inference concerning the Court's view of the merits...." Farr v. Pitchess, 409 U.S. 1243, 1246 (1973); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1950).

punitive damages awards in asbestos cases has been considered by this Court.[2]

Plaintiffs suggest that this Court should not consider Keene's Petition since the "propriety" of punitive damages has been decided by the substantive law of West Virginia. Pb 6. This argument misses the mark. West Virginia appellate courts have never considered the issue of repetitive punitive damages in asbestos cases under the Haslip analysis.

Plaintiffs cite the case of Davis v. Celotex Corp., 1992 WL 130567 (W. Va.), for the proposition that the West Virginia Supreme Court of Appeals

---

[2] None of the cases cited by plaintiffs was decided after this Court rendered its decision in Haslip. The Second Circuit, which decided both Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2d Cir. 1990). *cert dismissed* 111 S.Ct. 27 (1990) and Johnson v. Celotox Corporation, 899 F.2d 1281 (2d Cir. 1990) *cert. denied* 111 S.Ct. 297 (1990), earlier had expressed concern over the constitutional implications of repetitive punitive damages in asbestos litigation. Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989).

"rejected precisely the same issues raised by Keene." Pb 10. This baldly misstates the Davis holding. The Davis court did not decide the issue of repetitive punitive damages, but rather, expressly *declined to address the issue*, due to an underdeveloped factual record. Id. at *9.[3]

Even so, Haslip held that state substantive law is not the last word on the constitutionality of punitive damages. This Court held that the Due Process Clause imposes both substantive and procedural limitations on state court awards of punitive damages. Haslip, 111 S.Ct. at 1044-46. Haslip established the parameters within which punitive damages

---

[3] One can only assume that plaintiffs' statement that Garnes and Davis were decided *prior* to the trial of these cases (Pb 16) is a scrivener's error, since the trial court in these cases had the benefit of neither Garnes, Davis nor Haslip.

must be awarded in order that they not run afoul of a defendant's Federal Constitutional due process rights.

Finally, plaintiffs incorrectly suggest that Keene is precluded from arguing the appropriateness of repetitive punitive damages awards due to its failure to present evidence on the issue below. Pb 16-17. Keene preserved the issue for appeal since the constitutionality of repetitive punitive damages was fully briefed to both the trial and appellate courts.

Plaintiffs argue instead that Keene should have introduced evidence of prior punitive damages awards and of its financial condition to the courts below. Pb 5-6. Yet, plaintiffs concede that these, and several other factors which must be considered under Haslip, "would likely have prejudiced Keene, and under

such circumstances, the trial court would have been obligated to keep such evidence from the jury." Pb 19. This "Catch 22" approach to constitutional law must not be given credence by this Court.

Once the jury rendered its verdict, the laws which governed review of punitive damages awards in West Virginia at the time in which the verdicts were rendered precluded examination on review of any evidence not presented to the initial finder of fact. Haga v. King Coal Chevrolet Co., 150 S.E.2d 599 (W.Va. 1966). West Virginia law affirmatively precluded Keene from presenting the type of evidence which must be considered under Haslip, and precluded the trial and appellate courts from taking additional evidence on the issue, as required by Haslip. See, Garnes, 413 S.E.2d at 909;

Johnson v. Hugo's Skateway, 1992 WL 213940 (4th Cir. (Va.)).

* * *

Plaintiffs present no valid grounds for a refusal by this Court to consider the due process implications of repetitive punitive damages awards for the same course of conduct in mass tort litigation. This Court should grant such review.

II.

THE PUNITIVE DAMAGES AWARDED IN THESE CASES CANNOT WITHSTAND CONSTITUTIONAL SCRUTINY AND MUST BE REVERSED.

The reviewing courts below implemented neither the substantive, nor the procedural, due process protections required under Haslip. Since their failure to do so cannot pass constitutional muster, the punitive damages verdicts cannot be allowed to stand.

This Court held that, substantively, punitive damages awards may not exceed the amount required to meet the societal goals of deterrence and retribution. Haslip, 111 S.Ct. at 1044-45. Procedurally, a system of awarding punitive damages must provide adequate mechanisms for ensuring that an award of punitive damages is not constitutionally excessive - that is, that the award furthers the goals of deterrence and retribution. Id.[4]

The jury in these cases assessed twenty-one separate punitive damages verdicts against Keene, while a second jury, simultaneously hearing the

---

[4] The other "goals" for punitive damages awards since articulated by West Virginia courts have not been and should not be adopted by this Court. Encouraging litigation, achieving personal revenge, promoting settlement and providing additional compensation for injured plaintiffs are not the standards against which the propriety of punitive damages should be judged.

identical evidence and applying the same legal "standards", found that no punitive damages were warranted. The trial court then reviewed the verdicts under a scheme which considered none of the factors mandated by Haslip. Finally, in contravention to Haslip and its own holding in Garnes, the West Virginia Supreme Court of Appeals simply refused to review the verdicts. Under Haslip, these unconstitutional verdicts, rendered under a wholly unconstitutional procedural format, cry out for review.

As more fully set forth in Keene's initial Petition, deterrence long ago ceased being a legitimate rationale to support punitive damages in asbestos cases. It is ludicrous to suggest now, at this stage of the litigation, when the majority of the asbestos-producing market is bankrupt or insolvent, when joint and

several liability requires Keene and the other remaining manufacturers to pay the shares of the absent defendants, when Keene has disposed of 78,000 cases but still faces over 87,000 claims, when new cases are being filed at a rate of 2000 per month, when Keene has pledged 80% of its remaining net worth to resolve the remaining meritorious lawsuits, when Keene already has been assessed $13 million in punitive damages, and when virtually every defendant ceased producing asbestos products decades ago, that more punitive damages awards in asbestos cases are necessary to deter anyone from anything.

Surely, one cannot argue with a straight face that defendants in asbestos cases have not "learned their lesson." Nor can one rationally suggest that any "message" intended by punitive damages in

asbestos litigation has not long ago been heard by every manufacturer in this country. Only contingent fee attorneys can still justify punitive damages in asbestos cases in 1992 - though they do so at the expense of Americans who lose their jobs due to mounting bankruptcies and future plaintiffs who will receive no compensation when the limited funds eventually run out.

Plaintiffs' suggestion that punitive damages are necessary to encourage settlements defies logic and ignores facts. Plaintiffs makes the astounding statement that punitive damages are necessary because "Keene refused to settle its cases." Pb 20 (emphasis supplied). It takes both parties to reach a settlement. Punishing the decision to exercise the right to trial has never been a legitimate basis for

perpetuating punitive damages.[5] Finally, plaintiffs' argument is just plain wrong. Several commentators have noted that punitive damages deter settlements, not encourage them. Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 Cardozo L. Rev. 1819, note 202 at 1868 (1992); Schwarzer, Punishment Ad Absurdum, 11 Cal. Law. 116 (Oct. 1991). Thus, the traditional rationales for punitive damages which undergird Haslip's substantive due

---

[5] Apparently, plaintiffs believe that punitive damages should deter Keene and other defendants from exercising their constitutional right to a jury trial. They cannot honestly claim that punitive damages are still needed to promote settlements. Keene has settled over 78,000 cases! It has settled hundreds of cases with plaintiffs' counsel, Henderson & Goldberg, in the last two years alone. Keene would have settled more, but Henderson & Goldberg insisted on trials in some cases, apparently hoping for a lottery-sized punitive award. Also, the fact that some of the plaintiffs' verdicts against Keene were completely offset by settlements from other companies only indicates that those claimants had been fully compensated already.

process framework do not support the jury's awards in these cases.

Finally, the nearly nonexistent post-verdict review process violated the procedural due process protections of Haslip. In Haslip, this Court upheld the procedural protections implemented by the Alabama Supreme Court, which requires a detailed post-verdict review by the trial court of at least nine factors to determine whether a punitive damages award is constitutionally excessive. 111 S.Ct. at 1044. A similar analysis is required on appeal to determine whether the punitive damages award "'exceed[s] an amount that will accomplish society's goals of punishment and deterrence.'" Id. at 1045 (quoting Green Oil Co. v. Hornsby, 539 So.2d 218, 222 (Ala. 1989)).

Both this Court and the West Virginia Supreme Court of Appeals found the West

Virginia punitive damages scheme to be constitutionally deficient under Haslip. Fleming Landfill, Inc. v. Garnes, ___ U.S. ___, 111 S. Ct. 2882 (1991); Garnes, 413 S.E.2d 897. After declaring West Virginia's procedures unconstitutional, the Garnes court established post-trial review procedures which satisfied the Haslip mandate. Id. at 908-9.

Not a single one of the constitutionally necessary review procedures mandated by Haslip and adopted by Garnes was followed in these cases. The trial court did not undertake such an analysis, and the appellate court did not even consider the petition.[6]

---

[6] To the extent that either court reviewed the verdicts, they were constrained by West Virginia's now displaced rule that jury verdicts be upheld unless "the award of punitive damages has no foundation in the evidence so as to evince passion, prejudice or corruption in the jury...." Wells v. Smith, 297 S.E.2d 872, 880 (W. Va. 1982).

Garnes specifically held that the West Virginia punitive damages scheme, which was in place and applied in these cases, unconstitutionally provided insufficient review by the trial court of punitive damages awards under Haslip. Garnes, 413 S.E.2d at 908.[7]

* * *

The punitive damages awards in this case, assessed under the unconstitutional West Virginia punitive damages scheme, cannot stand.

---

[7] Plaintiffs argue that "requir[ing] an appellate court to automatically review all cases awarding punitive damages, as Keene suggests, would discourage settlements and increase the cost of litigation, contrary to the purpose of such awards." Pb 21. Unfortunately for plaintiff, not only Keene, but this Court in Haslip and the West Virginia Supreme Court of Appeals in Garnes disagree.

CONCLUSION

For the foregoing reasons, as well as those expressed in Keene's initial Petition, Keene Corporation's petition for certiorari should be granted.

Respectfully submitted,

Andrew T. Berry
Counsel of Record
Gita F. Rothschild
McCarter & English
Four Gateway Center
100 Mulberry Street
Newark, N.J. 07102
(201) 622-4444
Attorneys for Petitioner,
Keene Corporation

Of Counsel:

Stuart E. Rickerson
Vice-President -
General Counsel
Keene Corporation
200 Park Avenue
New York, N.Y. 10166
(212) 557-1900

DATED: September 21, 1992

(6)

No. 92-359

Supreme Court, U.S.
FILED
OCT 1 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

—v.—

LEONARD ADAMS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

STUART E. RICKERSON
Vice President–
General Counsel
Keene Corporation
200 Park Avenue
New York, New York 10166
(212) 557-1900

ANDREW T. BERRY
Counsel of Record
GITA F. ROTHSCHILD
MCCARTER & ENGLISH
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(201) 622-4444

Attorneys for Petitioner, Keene Corporation

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

RULES INVOLVED 1

ARGUMENT 2

CONCLUSION 8

SUPPLEMENTAL APPENDIX Sa1

TABLE OF AUTHORITIES

Cases: **Page**

In re Asbestos Products Liability Litigation (No. VI), 771 F. Supp. 415 (Jud. Pan. Mult. Lit. 1991) 3

Dunn v. Hovic, et al., No. 91-3837 (3d Cir. September 18, 1992) . . . . *passim*

Pacific Mutual Life Ins. Co. v. Haslip, ___ U.S. ___, 111 S.Ct. 1032 (1991) 4, 6

Miscellaneous Authorities:

Report of the Judicial Ad Hoc Committee on Asbestos Litigation, (March, 1991) . . . 4

RULES INVOLVED

Petitioner Keene Corporation ("Keene") submits this Supplemental Brief under Supreme Court Rule 15, to call to this Court's attention new case law not available at the time of Keene's previous filings.

ARGUMENT

On September 18, 1992, Hon. Joseph F. Weis, Jr., of the Third Circuit Court of Appeals, joined the growing ranks of jurists and legal scholars calling for an end to punitive damages awards in asbestos cases by declaring:

> [P]arochial concerns... have influenced some states to allow punitive damages.... But it is time that some jurisdiction faces up to the realities of the situation and takes a step that might, perhaps, lead others to adopt a broader view. Courts should not wait any longer for congressional and legislative action to correct common law mistakes made by the courts. Errors created by courts can be corrected by courts without engaging in judicial activism.

Dunn v. Hovic, et al., No. 91-3837 (3d Cir. September 18, 1992) (appended

hereto), slip op. at 65 (Sa122-23) (Weis, J., dissenting).[1]

Unfortunately, the two judges representing the majority in Dunn chose instead the well-worn path of declining responsibility or authority to correct the well-recognized "asbestos mess."[2] Although the majority agreed that repetitive punitive damages awards in asbestos cases raise serious practical and constitutional concerns, it refused to act on those concerns under the misguided belief that it was not the "appropriate forum" for such relief. Id. at 47-48 (Sa89, Sa92).

---

[1] Dunn involved a $25 million punitive damages verdict (remitted to $2 million and further remitted to $1 million) assessed against Owens-Corning Fiberglas Corp. in a single plaintiff asbestos personal injury case.

[2] In re Asbestos Products Liability Litigation (No. VI), 771 F.Supp. 415, 424 (Jud. Pan. Mult. Lit. 1991)

There is no question that this Court is the "appropriate forum" to begin to address this "disaster of major proportions." Report of the Judicial Ad Hoc Committee on Asbestos Litigation, at 2 (March, 1991).

Under this Court's opinion in Pacific Mutual Life Ins. Co. v. Haslip, ___ U.S. ___ 111 S.Ct. 1032 (1991), the Dunn majority correctly held that punitive damages awards must be no "'greater than reasonably necessary to punish and deter.'" Dunn, slip op. at 45 (Sa86) citing Haslip, 111 S. Ct. at 1046. More importantly, the Dunn court recognized that a constitutionally necessary part of this analysis in asbestos cases must include broader "consider[ation of] the effect of successive punitive damages awards in mass tort cases arising from the same

course of conduct." Slip op. at 45 (Sa86).

Judge Weis decried the majority's failure to strike all punitive damages in asbestos cases. Noting that "[t]he number of claims and bankruptcy filings have created the likelihood that future claimants will not be able to recover for their injuries," Judge Weis declared: "It is time - perhaps past due - to stop the hemorrhaging so as to protect future claimants." Id. at 56, 61 (Sa105, Sa116).

Judge Weis recognized that the traditional rationales for punitive damages no longer support these awards in asbestos cases.

> [T]he avalanche of compensatory claims against asbestos manufacturers... has surely served as more of a punishment and deterrent than individual punitive assessments in isolated cases

> against manufacturers of products in other fields.
>
> * * *
>
> Under current conditions, it is fanciful to believe that punishment and deterrence are factors worthy of consideration in assessing priorities to limited funds. Here, punitive damages should not be recovered because their purposes are not being served and their benefits are outweighed by their costs to society.

Id. at 64-66 (Sa122-25).

In short, Judge Weis wrote: "[T]he stark reality [is] that unless something is done now the formerly 'deep pocket' will soon be empty." Id. at 64 (Sa122).

The Dunn majority recognized that Haslip requires reviewing courts in asbestos cases to examine punitive damages verdicts, alone and in conjunction with the current state of the asbestos litigation nationwide. The absence of this constitutionally mandated review procedure in these cases violates

Keene's due process rights and necessitates reversal of the punitive damages awards. In addition, Keene urges this Court to follow the sound reasoning of the Dunn dissent and strike punitive damages from these and all asbestos cases.

CONCLUSION

For the foregoing reasons, as well as those expressed in Keene's initial Petition and Reply Brief, Keene Corporation's petition for certiorari should be granted.

Respectfully submitted,

Andrew T. Berry
Counsel of Record
Gita F. Rothschild
McCarter & English
Four Gateway Center
100 Mulberry Street
Newark, N.J. 07102
(201) 622-4444
Attorneys for Petitioner, Keene Corporation

Of Counsel:

Stuart E. Rickerson
Vice-President -
General Counsel
Keene Corporation
200 Park Avenue
New York, N.Y. 10166
(212) 557-1900

DATED: September 30, 1992

SUPPLEMENTAL APPENDIX

Sa1

Filed September 18, 1992

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 91-3837

WILLIAM DUNN

HESS OIL VIRGIN ISLANDS CORP.

v.

HOVIC; AMERADA HESS CORP.; KEENE

CORPORATION

v.

THE LITWIN CORPORATION; LITWIN

PANAMERICAN; BORINQUEN INSULATION CO.

Owens-Corning Fiberglas Corporation,

Appellant

On Appeal from the

District Court for the Virgin Islands

(St. Croix) (D.C. Civil No. 87-00238)

Argued April 22, 1992

Before: SLOVITER, *Chief Judge*, MANSMANN and WEISS, *Circuit Judges*

(Opinion filed: September 18, 1992)

Barry S. Simon (Argued)
Paul Mogin
Williams & Connolly
Washington, D.C. 20006
Attorneys for Appellant

Joel H. Holt (Argued)
Christianstead, VI 00820
Paul S. Minor
Minor & Guice
Biloxi, Mississippi 39533
Attorney for Appellee

OPINION OF THE COURT

SLOVITER, *Chief Judge*

Owens-Corning Fiberglas Corporation (OCF) appeals the judgment of the district court awarding William Dunn $500,000 in compensatory damages for asbestos-related injury and $2 million in punitive damages.

I.

PROCEDURAL POSTURE

In 1987 William Dunn, a former pipe installer at Hess Oil Virgin Islands Corporation (HOVIC), filed this action against OCF as well as other manufacturers of asbestos-containing products, alleging personal injuries caused by exposure to asbestos. Following a trial in which liability and compensatory damages were determined before the issue of punitive damages, the jury awarded Dunn $1.3 million in compensatory damages and $25 million in punitive damages against the sole remaining defendant, OCF, the distributor and later manufacturer of Kaylo, an asbestos-containing pipecovering.

OCF filed post-trial motions pursuant to Federal Rules of Civil Procedure 50(b) and 59 requesting a

Judgment Notwithstanding the Verdict or, in the alternative, a new trial. The district court denied the motion for JNOV, but conditioned the denial of the motion for a new trial on Dunn's acceptance of a remittitur of the compensatory award to $500,000 and the punitive award to $2 million. Dunn v. Owens-Corning Fiberglas, 774 F. Supp. 929, 951-52 (D.V.I. 1991). Dunn accepted the remittitur, and OCF appeals. We have jurisdiction under 28 U.S.C. § 1291 (1988).

II.

STANDARD OF REVIEW

In ruling on a motion for JNOV, the district court must view the evidence, together with all reasonable inferences therefrom, in the light most favorable to the verdict winner. Rotando v. Keene Corp., 956 F.2d 436, 438 (3d Cir. 1992).

We apply the same standard on appeal as the district court, id., and will affirm the denial of the motion "unless the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." Dawson v. Chrysler Corp., 630 F.2d 950, 959 (3d Cir. 1980) (internal quotations omitted), cert. denied, 450 U.S. 959 (1981).

We review the denial of a motion for a new trial for abuse of discretion, Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 290 (3d Cir.), cert. denied, 112 S.Ct. 373 (1991), and note that "the district court ought to grant a new trial on the basis that the verdict was against the weight of the evidence only where a miscarriage of justice would result if the verdict were to stand." Williamson v. Consolidated Rail Corp.,

926 F.2d 1344, 1352 (3d Cir. 1991). In addition, "we may disturb the district court's determination with respect to a remittitur only for abuse of discretion, and reverse and grant a new trial only if the verdict is so grossly excessive as to shock the judicial conscience." Gumbs v. Pueblo Int'l, Inc., 823 F.2d 768, 771 (3d Cir. 1987) (internal quotations omitted).

III.

DISCUSSION

Rather than focus its appeal on liability, OCF raises numerous issues going to damages. We will address first the compensatory damages issues, then the evidentiary issues which implicate both compensatory and punitive damages, and finally the issues relating to punitive damages, on which OCF places its primary emphasis.

A.

COMPENSATORY DAMAGES

1. Sufficiency of the Evidence

From the evidence presented at trial, the jury could reasonably have concluded the following. In 1950 Dunn went to work as a pipe installer's helper for Dow Chemical in Texas. App. at 846-47. After working in various places in the United States and the Caribbean, Dunn began working at the Hess Oil refinery in St. Croix, Virgin Islands in 1966 as a pipe installer. App. at 859-64. He testified that as a result of his duties, which often required cutting, sawing or pounding of asbestos-containing insulation, he was covered from head to toe in dust from early morning until he left work. App. at 868-69. Dunn identified OCF's Kaylo as the asbestos-

containing insulation product he used most.[1] App. at 870.

Beginning in the mid-1980s, Dunn began to experience shortness of breath and weight loss. App. at 878-79, 888. He was diagnosed as suffering from "a lung condition . . . caused by asbestos." App. at 879. Prior to that time Dunn enjoyed a variety of athletic activities, including running, swimming, biking, and weight lifting. App. at 876. He claims that because of his lung disease, he can no longer engage in the athletic activities he enjoyed previously. App. at 889. Dunn testified about his great fear of contracting cancer in the future and his depression at seeing long-time

---

[1] The parties stipulated that from 1953 through 1972, Kaylo contained an average of 15 percent asbestos. App. at 963, 1068.

friends die of asbestos-related disease. App. at 889-92.

Dunn asked for compensatory damages for present and future pain and suffering, including compensation for his fear of contracting cancer. OCF contends that Dunn did not adduce enough evidence at trial to show that he suffers from compensable injury. In particular, OCF claims that under the American Thoracic Society standards for diagnosing asbestosis, the evidence presented at trial demonstrates that Dunn does not exhibit the conditions necessary for a diagnosis of asbestosis.

Under the Virgin Islands Code, in the absence of local law to the contrary, the Restatements of the law approved by the American Law Institute control. V.I. Code Ann. titl. 1 § 4 (1967); see Berroyer v. Hertz, 672 F.2d 334, 340 (3d

Cir. 1982). OCF notes that Restatement (Second) of Torts sections 388 and 402A make "harm" an essential element of claims for negligence and strict liability. However, section 7(2) defines "harm" as "the existence of loss or detriment in fact of any kind to a person resulting from any cause." Restatement (Second) of Torts §7(2) (1965). Comment b explains that "'[h]arm' implies a loss or detriment to a person, and not a mere change or alteration in some physical person, object or thing. . . . In so far as these acts or conditions are detrimental to him, he suffers harm." Id. cmt. b.

It is undisputed that Dunn has extensive pleural thickening on the exterior of his lungs. See App. at 661-62, 762-63. OCF nevertheless argues that the presence of pleural plaques does not

constitute compensable injury, citing Purjet v. Hess Oil Virgin Islands Corp., 22 V.I. 147, 149 (D.V.I. 1986), for the proposition that Dunn must prove "[a]ctual injury or damage" to recover. In that case, plaintiffs, neither of whom suffered from any asbestos-related condition, brought a suit seeking, inter alia, damages for enhanced risk of developing asbestos-related diseases. In granting summary judgment for the defendants, the district court held that under Virgin Islands law, "a tort claim will not lie in the absence of a demonstrable injury [and] mere exposure to asbestos is insufficient to state a cause of action." Id. at 154; see also Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3d Cir.) (for purposes of F.E.L.A. claim, "manifest injury [is] a necessary element of an asbestos-

related tort action"), cert. denied, 474 U.S. 864 (1985).

We need not decide in this case whether the mere presence of pleural plaques constitutes the "harm" necessary to recover damages for tort under the Restatement. We note that more recent cases applying the law of states within this circuit have held that it is. Thus, in Martinart v. Asbestos Corp., No. 1816, 1992 Pa. Super. LEXIS 2193 (July 20, 1992), the Pennsylvania Superior Court, sitting in banc, held that "pleural thickening, even when asymptomatic, is an injury which gives rise to a cause of action."[2] Id. at *24.

---

[2] In light of the evidence in this case we need not decide the effect of Martinart on our earlier decision in Howell v. Celotex Corp., 904 F.2d 3, 5 (3d Cir. 1990), that under Pennsylvania law the determination of whether pleural thickening constitutes compensable injury is for the trier of fact.

Two medical experts testified on Dunn's behalf. Dr. David Egilman, who is board certified in internal and occupational medicine with a specialty in occupational lung disease, see App. at 156, stated that Dunn had "the exact injuries that you would expect if someone was injured from breathing in the asbestos." App. at 164. He also stated that he was "certain that [Dunn] has asbestos-related lung disease, both in the lung tissue and around the lung," and concluded that Dunn suffers from asbestosis. App. at 297.

Dunn's other expert witness, Dr. David Kern, also certified in occupational and internal medicine, concurred in this diagnosis, stating that Dunn "definitely did have asbestosis." App. at 666. Both experts testified that when they examined Dunn's lungs they

heard rales, a velcro-like sound indicative of asbestosis. App. at 294-95, 680. These observations mirrored that of the first doctor to examine Dunn in 1985. App. at 294.

Dr. William Cole, OCF's radiology expert, testified that the outer lining of Dunn's lungs displayed pleural plaques and that asbestos exposure was probably the cause. App. at 762-63, 765. This same conclusion was reached by Dr. Kern who stated that Dunn's pleural plaques were massive. App. at 662. Dr. Kern also testified that pleural plaques "have an effect on lung function." App. at 661. Dr. Cole agreed that in an advanced stage, pleural plaques could affect lung functioning. App. at 818.

Thus, in this case, there is evidence, if believed, that Dunn suffers from more than mere pleural plaques. In

the first place, Dunn's plaques "are massive." App. at 662. Dunn "ha[s] both scarring of the lining of the lung, both in front and on the muscle that's under the lung. And he also has scarring in the lung tissue." App. at 272. In the second place, and more important, Dunn's experts testified that as a result of his exposure to asbestos, Dunn has reduced lung capacity. Tests performed demonstrated that Dunn's lung capacity decreased by about 20% between 1985 and 1989 and that a further decrease occurred between 1989 and 1990. App. at 277-78. Dr. Egilman testified that Dunn's disease was progressing at a rapid rate and that his total lung capacity would continue to decrease. App. at 299. According to both Drs. Egilman and Kern, such a decrease is abnormal and consistent with

a diagnosis of asbestosis. App. at 279-80, 668-70.

Furthermore, in 1989, a small nodule was discovered on Dunn's lower left lung. App. at 288-89, 890. Although Dr. Egilman did not believe it was malignant at that time, he recommended that it be examined and x-rayed every three to five months. App. at 290-91. Finally, Dr. Egilman testified that Dunn had a greater than fifty percent chance of dying from an asbestos-related disease and that Dunn's fear of contracting cancer was reasonable. App. at 300.

While OCF did present colorable evidence tending to contradict the conclusions of Dunn's experts, it was not so overwhelming that the jury could not reasonably conclude that Dunn suffers from mild asbestosis which is likely to worsen. As the district court properly

noted, "[i]t was well within the jury's province to decide to credit the testimony of plaintiff's doctors while discounting that of defendant's." Dunn, 774 F. Supp. at 937. Dunn's shortness of breath and inability to engage in the extent of physical activity he enjoyed previously are detrimental effects that constitute sufficient "loss or detriment" to justify an award of compensatory damages.

In Herber v. Johns-Manville Corp., 785 F.2d 79 (3d Cir. 1986), a case brought by a plaintiff with pleural thickening, we ruled that under New Jersey law a plaintiff need only demonstrate "slight impact and injury . . . to warrant recovery for emotional distress caused by fear." Id. at 85; see Sullivan v. Combustion Eng'g, 590 A.2d 681, 683 (N.J. Super. Ct. App. Div.)

(citing Herber with approval), cert. denied, 598 A.2d 897 (N.J. 1991). Thus, even assuming Dunn does not suffer from asbestosis, the jury was free to conclude that notwithstanding OCF's evidence of Dunn's physical activity, the physical impact of Dunn's pleural plaques caused enough harm to warrant recovery, particularly when combined with the anxiety associated with the fear of cancer.[3] See McCleary v. Armstrong World Indus., Inc., 913 F.2d 257, 258

---

[3] In Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir.) (en banc), cert. denied, 478 U.S. 1022 (1986), the court stated:

> [Plaintiff's] fear is plainly a present injury. It is a fear which he experiences every day and every night. It is a fear which is exacerbated each time he learns that another victim of asbestos has died of lung cancer. It is fear which, regardless of whether [plaintiff] actually gets cancer, will haunt him for the rest of his life.

Id. at 414 (footnote omitted). These words are equally applicable to Dunn.

(5th Cir. 1990) (upholding under Texas law jury verdict in asbestos case where plaintiff suffered from "pleural fibrosis"); Dartez v. Fibreboard Corp., 765 F.2d 456, 468 (5th Cir. 1985) (accumulation of asbestos fibers in lungs sufficient injury under Texas law to support claim for fear of cancer).

2. Excessiveness of the Remitted Compensatory Damages Award

OCF asks this Court for further remittitur of the district court's compensatory damages award, arguing that comparison to awards in similar cases and that lack of proof of special damages demonstrate the excessiveness of the remitted $500,000 compensatory award. Admittedly, $500,000 is generous, but it certainly is not the highest award of its kind, see App. at 1842, 1843, 1918, 1919, 1921, and does not shock our judicial

conscience. Given our deferential scope of review, see Gumbs, 823 F.2d at 771, we conclude that the district court did not abuse its discretion in granting a remittitur to $500,000.[4]

B.

EVIDENTIARY ISSUES

1. Testimony of Dunn's Expert Witness

OCF argues that both the punitive and compensatory damages awards should be reversed because of the district court's evidentiary rulings under Federal Rule of Evidence 702.[5] This court reviews

---

[4] OCF argues that the size of the jury's initial $1.3 million award alone indicates passion or bias requiring a new trial. We disagree. Other juries have awarded such sums in similar cases, see, e.g., App. at 1843 ($1.091 million awarded to plaintiff with asbestosis), and we find nothing in the record suggesting bias or prejudice.

[5] This rule permits expert testimony, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Fed. R. Evid. 702. The commentary to this rule further explains: "The rule . . . recognizes that an expert on the stand may give a dissertation or exposition of

evidentiary rulings under Rule 702 for abuse of discretion. See United States v. Leo, 941 F.2d 181, 188 (3d Cir. 1991). We have explained that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." Fed. R. Evid. 103(a); see also Linkstrom v. Golden T. Farms, 883 F.2d 269, 269 (3d Cir. 1989). We "will interpret possible helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases." Linkstrom, 883 F.2d at 270; see also American Technology Resources v. United States, 893 F.2d 651, 655 (3d Cir. (helpfulness standard interpreted broadly), cert. denied, 495 U.S. 933 (1990); Breidor v. Sears, Roebuck & Co.,

---

scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts." Id., Advisory committee's note.

722 F.2d 1134, 1139 (3d Cir. 1984) ("[h]elpfulness is the touchstone of Rule 702").

We have previously expressed our view that in most cases "'[t]he jury is intelligent enough, aided by counsel, to ignore what is unhelpful in its deliberations,'" and noted that "'even when jurors are well equipped to make judgments on the basis of their common knowledge and experience, experts may have specialized knowledge to bring to bear on the same issue which would be helpful.'" In Re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 279 (3d Cir. 1983) (quoting 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶¶ 702[03], 702[02]), rev'd on other grounds, 475 U.S. 574 (1986). Finally, "to the extent that [OCF implies] that expressions of opinion on the ultimate fact in issue

somehow impermissibly invades the province of the jury, it is inconsistent with the clear mandate of Rule 704." Id. (citation omitted).[6]

With these general principles in mind we address the issues raised by OCF. Dunn's principal expert witness, Dr. Egilman, is an M.D. who specializes in occupational medicine, i.e., the diagnosis and treatment of problems related to exposure to chemicals or other substances. App. at 131. The record reveals that Dr. Egilman takes referrals from companies to evaluate workers for illnesses that have occurred in the

---

[6] Rule 704 states in pertinent part:

> (a) Except as provided in subsection (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Fed. R. Evid. 704.

workplace. App. at 138. Dr. Egilman also conducts medical surveillance for companies to determine whether employees may be unduly exposed to toxic substances. App. at 139. Finally, he assists companies in analyzing information to determine whether or not substances used are harmful. When harmful substances are encountered, he instructs these companies as to

> how they should be properly handled, how workers should be educated about how to work with them so they won't get hurt, how warnings should be put on them and, in some cases, how the community physicians need to be informed.

App. at 139.

OCF claims that it was improper for Dr. Egilman to comment from his review of OCF's corporate records that OCF knew of the risks associated with exposure to asbestos. App. at 619. In light of our broad view of the "helpfulness" standard

of Rule 702 and Dr. Egilman's particular experience in working directly with employers on issues of this general concern, we find no abuse of discretion as to the admission of this testimony under Rule 702.

OCF also challenges the admission of Dr. Egilman's testimony that

> based on what they [OCF] knew in the 40's and 50's, what they could have known and didn't know, they clearly did not meet the obligation of the standard that they knew and presented in this memo in 1941.

App. at 316.

The document referred to in Dr. Egilman's testimony is a 1941 OCF memorandum discussing whether "Fiberglas," then a new material, could be safely offered to industry. The OCF memorandum states that "those who are engaged in the manufacture of Fiberglas [sic] necessarily must have reassured

themselves about the health aspects of the material before offering it for sale - for two reasons": first, from a "humanitarian point of view, no company can afford to subject its employees to an unknown hazard" and second, from "a cold business view," because of concern about liability from users. App. at 2150A-E. The memo then discusses in depth research into the potential health hazards of fiberglass. Thus, Dr. Egilman's testimony expressed his own belief that OCF's conduct with respect to Kaylo did not meet its own self-imposing standard. Again, such commentary was not so inappropriate that we must hold that the district court abused its discretion in admitting this testimony.[7]

---

[7] OCF also challenges Dunn's follow-up question, which asked whether that statement represented Dr. Egilman's "opinion to a reasonable medical probability as a health hazard consultant to industry." App. at 316.

OCF also argues that it was improper for Dr. Egilman to state his conclusion that OCF was "the last company to put warnings" on its asbestos products and that those warnings did not appear on OCF materials until 1972. App. at 316. We agree with OCF. The jury did not need expert opinion to evaluation when OCF put warning labels on its Kaylo product.

Nevertheless, we conclude that such error was harmless. In particular, we note the testimony of Dunn, App. at 870-74, and his product identification witness, Mr. McComely Bully, App. at 631-32, that they did not recall seeing warning labels on the Kaylo boxes. In addition, OCF vigorously disputed Dr.

We view this question as nothing more that Dunn's attempt to underscore Dr. Egilman's qualifications. Even assuming that the question was improper, OCF did not object to it, and we do not find it so prejudicial as to constitute plain error.

Egilman's contention during the trial, see App. at 1235-39, and was not substantially prejudiced by this isolated remark.

The admissibility of particular expert testimony must be evaluated on review in the context of the entire case. For that reason, cases from other circuits on which OCF relies are not very helpful. Thus, for example, in Andrews v. Metro N. Commuter R.R. Co., 882 F.2d 705, 708 (2d Cir. 1989), cited by OCF, the court vacated the plaintiff's jury verdict in part because the expert testimony referred to facts that were not in evidence and expressed his belief that the railroad was negligent, a patently improper statement. See Fed. R. Evid. 704 advisory committee notes (improper for expert to tell jury what results to reach). In contrast, OCF does not

contend that Dr. Egilman referred to facts not in evidence. Moreover, we do not view Egilman's testimony as telling the jury the ultimate result to reach. Cf. McGowan v. Cooper Indus., Inc., 863 F.2d 1266, 1272 (6th Cir. 1988) (approving district court's exclusion of expert's proposed testimony, which included conclusion that defendant was negligent). We will not reverse the verdict based on his testimony.

2. The Hemeon Report

OCF also contends that it was reversible error for the district court to admit the Asbestos Textile Institute's unpublished Hemeon Report. Specifically, OCF argues that the report was irrelevant under Federal Rule of Evidence 402 and that its prejudicial impact outweighed

its probative value, warranting exclusion under Federal Rule of Evidence 403.[8]

Rulings under Rule 403 are reviewed for abuse of discretion, see In Re Japanese Elec. Prods. Litig., 723 F.2d at 260, and, as we noted in our recent opinions, so are relevancy determinations under Rule 402. See Pfeiffer v. Manion Center Area Sch. Dist., 917 F.2d 779, 781 (3d Cir. 1990); Anderson v. Pittsburgh - De Moines Corp., 893 F.2d 638, 641 (3d Cir. 1990).

The Hemeon Report questioned whether the then-generally acknowledged threshold

---

[8] Under Rule 403,

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403.

limit value for levels of exposure to asbestos provided assurances of safety. Prior to this report, both the 1938 Dreessen study, prepared under the direction of the Surgeon General, and the 1946 Fleisher-Drinker study indicated that asbestosis would not result if asbestos dust were kept below 5 million particle per cubic foot of air. In 1946, the American Conference of Governmental Industrial Hygienists promulgated a threshold limit value of 5 million particles per cubic foot, which became widely accepted.

According to comment j of the Restatement section 402A, a manufacturer is liable for danger of which the manufacturer "has knowledge, or by application of reasonable, developed human skill and foresight, <u>should have knowledge</u>." Restatement (Second) of

Torts § 402A cmt. j (1965) (emphasis added). The comment to section 12 of the Restatement further states, in relevant part:

> "[S]hould know" implies that the actor owes another the duty of ascertaining the fact in question. . . . "Should know" indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence thereof in the proper performance of that duty.

Id. at § 12 cmt. a. Dunn argued that the Hemeon Report was admissible as evidence of what OCF should have known concerning the dangers associated with exposure to asbestos.

We find persuasive the analysis of the Second Circuit in George v. Celotex Corp., 914 F.2d 26, 28-31 (2d Cir. 1990), where the court held that the district court did not abuse is discretion in admitting the Hemeon Report in an

asbestos case against Celotex Corporation, a company which, like OCF, was not a member of the Asbestos Textile Institute. As in this case, there was no evidence on the record in George to indicate that Celotex ever had access to the report. In applying New York strict liability law, which "'generally follows the guidelines set forth in § 402A [of the Restatement],'" id. at 28 n.1 (quoting Farina v. Niagara Mohawk Power Corp., 438 N.Y.S.2d 645, 646 (App. Div. 1981)), the court concluded that the report was relevant to show "what, if the jury so determined, Celotex reasonably should have known had it either conducted its own tests or been in contact with others in the industry . . . that were testing." Id. at 29. This rationale applies with equal strength here.

With respect to Celotex's argument that the prejudicial impact of the report outweighed its probative value, the court concluded that "[a]ny prejudice to Celotex was derived from the Hemeon Report's probative force and thus did not unfairly prejudice Celotex." Id. at 31. Once again, the same is true in this case. OCF argues that George is distinguishable because the court applied a "could have known" rather than a "should have known" standard in that case. However, we find no support for that subtle distinction in the George opinion.

OCF refers us to Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986) (applying Maryland law), and Murphy v. Owens-Illinois, Inc., 779 F.2d 340 (6th Cir. 1985) (applying Tennessee law), cases in which the

admissibility of the Hemeon Report was not in issue. Instead, in these cases the courts merely upheld the respective district courts' exclusion of certain other documents and testimony.[9] Many of the asbestos cases are based on the same general body of industry documents, and the courts of appeals have tended to uphold the discretionary rulings, albeit different, of the trial courts. Compare Lohrmann, 782 F.2d at 1159-60 (holding that district court did not abuse its discretion in excluding documents gathered by Sumner Simpson, a former president of Raybestos Manhattan (now Raymark)), with King v. Armstrong World Indus., Inc., 906 F.2d 1022, 1025 (5th Cir. 1990) (no abuse of discretion in

---

[9] The Hemeon Report contains no prejudicial exhortations of the type that characterized the testimony which the court of appeals found "highly prejudicial" in Murphy. 779 F.2d at 344.

admitting Sumner Simpson papers as they are "relevant to the issue of what knowledge was scientifically discoverable by the industry as a whole at a certain time"), cert. denied, 111 S. Ct. 2236 (1991).

In light of the relevance of the Hemeon Report to what OCF "should have known" concerning the dangers associated with asbestos, and the absence of unfair prejudice to OCF, we find no abuse of discretion in its admission.

C.

PUNITIVE DAMAGES

We turn finally to OCF's vigorous attack on the punitive damage award, reduced by the district court to $2 million. OCF's attack is wide-ranging. The jury's verdict, and the district court's remittitur, can be evaluated only in the context of the evidence introduced

by Dunn in the punitive damages phase of the trial. We therefore consider first OCF's challenge to the sufficiency of the evidence.

1. Sufficiency of the Evidence

Under the Restatement, "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Restatement (Second) of Torts § 908(2) (1977). Such conduct must be shown by clear and convincing evidence. Acosta v. Honda Motor Co., 717 F.2d 828, 839 (3d Cir. 1983). OCF argues that the evidence was insufficient to support the award of punitive damages or, in the alternative, that the verdict went against the clear weight of the evidence, requiring a new trial on whether punitive damages are appropriate.

OCF points to evidence tending to show that prior to its decision to place warning labels on Kaylo boxes, the prevailing industry belief was that asbestos insulation products were safe. See App. at 1522-24. OCF argues that its Kaylo product was considered an improvement over prior insulation products because it contained a lower percentage of asbestos. It points to an independent study conducted by Union Carbide between 1961 and 1963 which concluded that Kaylo, unlike Johns-Manville and Philip Carey products, could be safely used within the 5 million particles per cubic foot threshold limit value established by the American Conference of Governmental Industrial Hygienists in 1946. See App. at 1355-72, 2287-97.

Nevertheless, we conclude that Dunn presented more than sufficient evidence from which a jury could conclude that OCF acted "with reckless indifference" in failing to place adequate warnings on its Kaylo product. Dunn's evidence revealed the following: In the early 1940s, insulation workers threatened to demand higher wages when using OCF's fiberglass material because of perceived health threats. See App. at 725-26. In response to this threat, Edward Ames, OCF's public relations officer and an assistant to its president, developed a plan to resolve this problem. As Ames explained, OCF had learned by this time that exposure to asbestos fibers could cause asbestosis. App. at 726.

In a memorandum OCF's president and executive vice-president dated January 7, 1942, Ames made the following

recommendation to inform workers of the extent of the hazard posed by asbestos-containing materials:

> Gather as a weapon-in-reserve an impressive file of photostats of medical literature on asbestosis. Available are two bibliographies covering medical literature to 1938, citing references to scores of publications in which the lung and skin hazards of asbestos are discussed. This file would cover five or six hundred pages . . . .

App. at 2151. This memorandum suggested that if OCF was unsuccessful in convincing union officials of the benefits of fiberglass as opposed to asbestos-containing insulation products, then this "asbestosis weapon-in-reserve" would be sent to union workers to "let them stew." App. at 2152.

When asked if OCF's then-president, Harold Boeschenstein, knew that asbestos products might pose a hazard to the lungs, Ames answered, "Mr. Boeschenstein

knew everything." App. at 727. In addition, OCF's attorney thought that Ames' plan was "a germ of a major strategy" and approved compiling an asbestosis file. App. at 729.

In 1943 Ames wrote another memorandum in which he criticized a proposal for adding asbestos to fiberglass, see App. at 732-33, writing:

> In formulating our policy on admixtures with asbestos, we should keep on the alert because otherwise we will run the risk of smearing fiberglas [sic] with the hazards of exposure to asbestos.
>
> Fabrication of asbestos [in both textile and pre-textile form] is a dusty process, and exposure to asbestos fly involves the danger of asbestosis, a pathological lung condition . . . minimized by the use of hoods and . . . respirators.

App. at 2154.

1944 Ames received a letter from a physician informing OCF that a patient of his, who worked as an insulator, had

developed asbestosis from exposure to insulation products. The letter stated in pertinent part:

> pipe coverer handling . . . asbestos . . . products on industrial insulation jobs [was] suffering from asbestosis, a condition that results from exposure to asbestos dust. The disease is a well recognized form of lung pathology that manifests itself in a diminution of lung capacity resulting in dyspnoea or shortness of breath.

App. at 2155.

OCF began distributing Kaylo products in 1953, and from 1958 until 1972 manufactured Kaylo insulation. App. at 1068. In the 1950s, Dr. Garret Schepers, head of the Saranac laboratory in New York, warned OCF that Kaylo contained material that would be hazardous to human beings. App. at 1018. Dr. Schepers also wrote two letters to Dr. M.D. Burch, director of personnel and industrial relations at OCF at the time,

advising him that "asbestos is fairly well incriminated as a carcinogen," App. at 2198, and that asbestos dust caused fibrosis. App. at 2207. Despite these warnings, OCF published brochures which repeatedly represented Kaylo as "non-toxic." App. at 2209, 2210, 2211, 2212, 2215. In addition, OCF touted Kaylo's "ease of application," see App. at 2211, and its "pleasant handling characteristics." App. at 2212. These brochures contained no warning of potential hazards.

A 1960 study of one of OCF's Kaylo manufacturing plants revealed that excessive asbestos dust exposure resulted from simply packing Kaylo into boxes. App. at 220-22. In 1963 the head of OCF's product development laboratory informed various corporate officers around the country that "[a]sbestos (as

found in Kaylo) when breathed into the lungs causes asbestosis which often leads to lung cancer." App. at 2221. In 1964 the National Insulation Manufacturers Association, of which OCF's representative was a director, noted that Johns Manville had decided to place warnings on its asbestos products. App. at 2225. OCF, however, declined to do so, see App. at 2229, even though it knew that insulators had a six to seven times greater incidence of lung cancer than the general male population. App. at 2226.

In early 1965, Dr. F.H. Edwards of OCF wrote to OCF's medical director as well as other corporate officials urging that serious consideration be given to labelling Kaylo products since "the amounts requested [by claimants] are usually sizeable." App. at 2229. Dr. Edwards reiterated this suggestion in a

memorandum dated August 6, 1966 in which he also acknowledged that "[i]t is impossible to guess the amount of dust created by the cutting, sawing, etc. of Kaylo. There are too many local factors involved." App. at 2230-31. While OCF claimed that by December 1966 it had placed warning labels on its products,[10] see App. at 1230, Dunn testified that he did not see warning labels on any of the cartons holding Kaylo that he observed in the Virgin Islands. App. at 870, 873. This testimony was echoed by McComely Bully, one of Dunn's co-workers at HOVIC. See App. at 623-34, 645. OCF did not offer the testimony of any HOVIC worker to the contrary.

---

[10] In a memorandum dated December 19, 1966, it was stated that a warning label should be "show[n] on all cartons in which we deliver Kaylo products." App. at 2236.

Dr. Egilman testified about the medical literature available at the time concerning the potential harm of exposure to asbestos dust. He noted that in the 1930s medical literature questioned the health effects of exposure to asbestos by insulators, particularly if the dust could be seen. App. at 167-71. In 1947 the confidential Hemeon Report was issued to the Asbestos Textile Institute, of which OCF has never been a member. This report questioned whether the then-generally acknowledged TLV for levels of exposure to asbestos provided "complete assurance[s]" of "thorough[] safe[ty]." App. at 204-006, 2181. Finally, Dr. Egilman testified about a 1949 article in the Journal of the American Medical Association that recognized that asbestos workers were at risk of developing cancer. App. at 233. In his opinion,

that article "establishe[d] that the general medical community was aware of the fact that asbestos caused cancer." App. at 233.

In light of this evidence, we agree with the recent conclusion of the Virginia Supreme Court that

> [t]he jury may have concluded . . . that Owens-Corning knew that inhalation of dust from its Kaylo product could cause lung disease in humans, that it actively concealed this danger, and it did not warn insulators of this hazard . . . .

Owens-Corning Fiberglas Corp. v. Watson, 413 S.E.2d 630, 642 (Va. 1992). The jury could reasonably have found that OCF acted with "reckless indifference to the rights of others" in this case, Restatement (Second) of Torts § 908(2) (1977), and thus, the district court appropriately denied OCF's motion for JNOV and did not abuse its discretion in

refusing to grant unconditionally the motion for a new trial.

2. Dunn's Closing Argument

OCF claims that it was denied a fair trial on the issue of punitive damages because of several remarks made by Dunn's counsel during closing arguments to the jury. Specifically, OCF argues that the following remarks or actions were improper: (1) the argument that the jury should return a large punitive award to force OCF to stop defending asbestos cases, see App. at 1761; (2) the suggestion by Dunn's counsel that counsel for OCF lied to the jury,[11] see App. at

---

[11] Specifically, Dunn's counsel stated:

> Unfortunately, ladies and gentlemen, you have heard a story here in this courtroom the last two weeks of corporate manipulation, of corporate suppression, and a word that I hate to use, of corporate lies.
>
> But, what's so bad about that is just not things that occur over the

1755; (3) the argument that the jury should award punitive damages as a reward to Dunn to bringing this lawsuit, see App. at 1756; (4) the request that the jury draw an analogy to the criminal fine imposed on Michael Milken earlier that week, see App. at 1758-59; (5) the appeal to the jury's local prejudice against "this big multi-national company."[12]

At the outset, we note that there are aspects of the plaintiff's closing argument that we believe crossed the line between acceptable advocacy and imprudent zeal. However, our disapproval of portions of the closing is not enough to

---

> last 40 or 50 years. but, it's even occurred in this courtroom. It's occurred in this courtroom.

App. at 1755.

[12] Specifically, Dunn's counsel argued: "You've got to have courage to tell this multi-national company, that it's not going to come into the Virgin Islands and hurt people and lie about it." App. at 1762.

warrant reversal on that ground. We note that OCF failed to make a timely objection with respect to the statements referred to in (1), (3)[13] and (5)[14] above, and thus has waived its challenge to these statements on appeal. See Woods v. Burlington N.R.R., 768 F.2d 1287, 1292 (11th Cir. 1985) (per curiam) (when party fails to object to improper closing argument, court of appeals only "retain[s] the authority to review for

---

[13] Comment e to the Restatement (Second) of Torts §908 (1977), which discusses punitive damages, states in relevant part: "Included in the harm to the plaintiff may be considered the fact that the plaintiff has been put to trouble and expense in the protection of his interests, as by legal proceedings in this or in other suits." Thus, arguably statement (3) was not, in itself inappropriate.

[14] In Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767, 772 (3d Cir. 1975), we concluded that a similar remark made in plaintiff's closing argument on punitive damages was not "so prejudicial...as to constitute reversible error in the absence of any objection or request for a cautionary instruction." We also noted that "it is proper to assess punitive damages as a deterrent and an example to the community." Id.

plain error), [the exercise of which] is seldom justified in reviewing argument of counsel in a civil case"), rev'd on other grounds, 480 U.S. 1 (1987); Hyman v. Life Ins. Co. of N.Am., 481 F.2d 441, 444 (5th Cir. 1989) (motion for mistrial on grounds of improper closing argument did not preserve issue for appeal when motion lacked requisite specificity).

While OCF did preserve its claims with respect to points (2) and (4),[15] in general "the trial judge is in a better position than an appellate court to determine whether remarks of counsel are prejudicial." Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767, 772 (3d Cir.

---

[15] During Dunn's closing argument, counsel for OCF objected to the analogy to Michael Milken and asked for a curative instruction, which the court declined to give. See App. at 1758-59. In addition, directly following Dunn's closing arguments, counsel for OCF moved for a mistrial, specifically objecting to Dunn's argument that "we came in here and lied." App. at 1763.

1975), and "at least for civil trials,...improper comments during closing arguments rarely rise to the level of reversible error." Littlefield v. McGuffey, 954 F.2d 1337, 1346 (7th Cir. 1992) (internal quotation omitted); see Lewis v. Penn Cent. Co., 459 F.2d 468, 470 (3d Cir. 1972), (trial judge has broad discretion in determining whether counsel's closing remarks were proper).

Here, the district court concluded that the remarks about corporate lies "are not improper in a summation regarding punitive damages," Dunn, 774 F. Supp. at 949, relying on the trial court's statement in Herman that "[i]n attempting to convince a jury that a defendant's conduct was outrageous and should be punished, an advocate must go beyond the kind of argument necessary to establish ordinary negligence." 379 F.

Supp. 1268, 1276 (D.V.I. 1974) (footnote omitted), aff'd, 524 F.2d 767 (3d Cir. 1975); see also Arnold v. Eastern Air Lines, Inc., 681 F.2d 186, 197-98 (4th Cir. 1982) (permissible range in punitive damage arguments is wide and inescapably volatile), cert. denied, 460 U.S. 1102 (1983), rev'd in part on other grounds, 712 F.2d 899 (4th Cir. 1983) (in banc), cert. denied, 464 U.S. 1040 (1984).

OCF relies on Draper v. Airco, Inc., 580 F.2d 91 (3d Cir. 1978), to support its claim that Dunn's reference to "corporate lies" constituted reversible error. However, that case is distinguishable. In Draper,

> [c]ounsel for the plaintiff . . . committed the following improprieties: (1) he attempted to prejudice the jurors through repeated inappropriate references to the defendants' wealth; (2) he asserted his personal opinion of the justness of his client's cause; (3) he prejudicially referred to facts

> not in evidence; and (4) without provocation or basis in fact, he made several prejudicial, vituperative and insulting references to opposing counsel.

Id. at 95.[16] The remarks of Dunn's counsel, while arguably intemperate, did not approach the unprofessional and prejudicial conduct of the attorney in Draper; the reference to lies told in the courtroom hardly qualify as "vituperative and insulting references" to counsel for OCF. When read in context, it becomes apparent that Dunn's counsel was arguing that OCF and its witnesses, not its attorneys, were telling untruths.

Our review of Dunn's closing argument reveals that his counsel

---

[16] We note that references to the defendant's wealth are not, in themselves, inappropriate in a closing argument on the issue of punitive damages. See Restatement (Second) of Torts § 908(2) (1977); Herman, 524 F.2d at 772 ("the wealth of the defendant is a factor which may properly be considered by the trier of fact in assessing punitive damages").

referred to Milken to stress the point that OCF as a wrongdoer should be punished. Punishment is one of the goals of punitive damages. See Restatement (Second) of Torts § 908 cmt. a (1977). The district judge was in the best position to assess any potential prejudicial impact of this reference. In light of the evidence presented as to OCF's conduct and the closing argument as a whole, we cannot conclude that the district court abused its discretion in not providing a curative instruction or in declining to order a mistrial.

3. Jury Charge

OCF claims that the jury charge was defective both under Virgin Islands law and as a constitutional matter for failing adequately to explain how to determine the amount of the punitive damages.

a. Virgin Islands Law

OCF argues that the court's instruction was inadequate under Virgin Islands law because it did not inform the jury of the relevance of plaintiff's actual injuries in calculating punitive damages. We need not decide whether Virgin Islands law required such an instruction[17] because OCF failed to make a timely and specific objection

---

[17] Neither the language of the Restatement and the accompanying comments nor prior case law supports the proposition that punitive damages must be related to actual injuries. See Restatement (Second) of Torts § 908(2) (1977) ("trier of fact can properly consider . . . the nature and extent of the harm to the plaintiff") (emphasis added); id. cmt. c (while "the extent of the harm may be considered in determining their amount, it is not essential to the recovery of punitive damages that the plaintiff should have suffered any harm, either pecuniary or physical") (emphasis added); Hospital Auth. v. Jones, 409 S.E.2d 501, 503 (Ga. 1991) (rejecting "notion that punitive damages must necessarily bear some relationship to the actual damages awarded by the jury"), cert. denied, 112 S. Ct. 1175 (1992); Kirkbride v. Lisbon Contractors, Inc., 555 A.2d 800, 803-04 (Pa. 1989) (punitive damages need not bear reasonable relationship to compensatory damages under Restatement § 908; remittitur always available to reduce awards that shock the conscience).

challenging the charge as erroneous under Virgin Islands law. Thus, this issue was not properly preserved for appeal under Federal Rule of Civil Procedure 51.[18] See Don Kemper Co. v. Beneficial Standard Life Ins. Co., 425 F.2d 221, 222 & n.4 (3d Cir. 1970); Bogacki v. American Mach. & Foundry Co., 417 F.2d 400, 407 (3d Cir. 1969).

OCF's only suggestion that "[t]he amount of punitive damages must bear a reasonable relationship to the actual damages suffered by the plaintiff" appeared in a proffered supplemental jury instruction, App. at 1497, which the

---

[18] This rule states in pertinent part:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

Fed. R. Civ. P. 51 (emphasis added).

district court did not consider because it was tendered after the cut-off for submitting instructions. See App. at 1592-94, 1605. In addition, despite being specifically informed by the district court at the time it proffered its supplemental instruction that "[a]fter [the] charge to the jury, you'll have a chance to make any exceptions you want to the charge." App. at 1594. OCF nevertheless failed to challenge the charge as deficient under Virgin Islands law after the charge was given. OCF's post-charge objections were limited to constitutional grounds, see App. at 1778, 1779, 1783, and the district court responded to OCF's objection on those grounds only. See App. at 1781, 1783; see also, Hoffman v. Sterling Drug, Inc., 485 F.2d 132, 139 n.22 (3d Cir. 1973) (rejecting under Rule 51 appeal by

defendant which objected to charge on one ground but sought to appeal on another).

As we have noted in the past, the purpose of Rule 51 is to "afford the trial judge an opportunity to correct the error in h[er] charge before the jury retires to consider its verdict and to lessen the burden on appellate courts by diminishing the number of rulings at the trial which they may be called on to review." McAdam v. Dean Witter Reynolds, Inc., 896 F.2d 750, 769 n.29 (3d Cir. 1990) (quoting Porter v. American Export Lines, Inc., 387 F.2d 409, 412 (3d Cir. 1968)). In this case, a curative instruction could have remedied any infirmity in the charge. OCF's failure to make a specific objection to the court's instruction under Virgin Islands

law subverted the purpose of Rule 51,[19] and we thus decline to review OCF's objections to the charge on that ground. See United States v. Logan, 717 F.2d 84, 91 (3d Cir. 1983) (absent objection, charge reviewable for plain error only); Trent v. Atlantic City Elec. Co., 334 F.2d 847, 859 (3d Cir. 1964) (same).

b. Constitutional Law

OCF also argues that the charge was constitutionally infirm. It complains of the trial court's alleged (1) inadequate instruction on the dual goals of punitive damages; (2) failure to instruct the jury that it must take into consideration the character and degree of

---

[19] In Levinson v. Prentice-Hall, Inc., 868 F.2d 558, 564 (3d Cir. 1989), on which OCF relies, we found that the defendant had preserved its objection in accordance with Rule 51.

the wrong as shown by the evidence; and (3) inadequate post-trial review.

Before turning to the merits of OCF's constitutional challenge, we conclude that OCF failed to preserve the objection in (2) above under Rule 51. Following the jury charge, OCF objected that it was "unconstitutionally uninformed" because "it does not provide standards for the jury upon which to base an aware of punitive damages." App. at 1778. This general objection alone was not specific enough to inform the court how to provide clearer standards.

OCF's proposed jury instruction did not contain language requiring the jury to consider the character and degree of the wrong to the plaintiff, see App. at 1636-38, and it never objected on that ground. The only objection we can find that remotely resembles the point now

urged on appeal stems from OCF's suggestion that the amount of punitive damages must bear a reasonable relationship to the amount of compensatory damages. See App. at 1783. This objection did not adequately put the court on notice of the issue OCF now raises.

As the Court of Appeals for the Eighth Circuit recently stated in a similar case:

> Although [defendant] made a general objection that the court's instructions on punitive damages violated the fourteenth amendment, [its] requested instruction did not elaborate any further on the standard for setting the amount of punitive damages. While we recognize that a party need not tender specific language if it has otherwise objected to an inadequacy in an instruction, we believe the overall record here shows that [defendant] did not comply with Fed. R. Civ. P. 51 by bringing to the court's attention the need for the jury to consider the nature and degree of the wrong.

Robertson Oil Co. v. Phillips Petroleum Co., 930 F.2d 1342, 1347 (8th Cir. 1991) (footnote and citation omitted); see also McCleary v. Armstrong World Indus., Inc., 913 F.2d 257, 260 (5th Cir. 1990). These words apply with equal force in this case, and thus we decline to review this point on appeal.

Turning to the remainder of OCF's constitutional objections to the charge, we look, of course, to Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991), the Supreme Court's most recent pronouncement on punitive damages. In Haslip, the Court held that the common-law method for assessing punitive damages is not so inherently unfair as to deny due process and be per se unconstitutional. Id. at 1043. The Court described the three-tier common-law

method for assessing punitive damages as follows:

> Under the traditional common-law approach, the amount of the punitive damage award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

Id. at 1042.

In its analysis of the constitutionality of the punitive damages award of over $800,000 in the case before it, the Court eschewed drawing "a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." Id. at 1043. The Court noted, however, that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a

jury properly enter into the constitutional calculus." Id.

The Court looked first to the jury instruction and concluded that while it gave the jury "significant discretion," the instruction nonetheless "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." Id. at 1044. Although the district court's jury instruction in this case was not a word-for-word duplication of the charge in Haslip, it contained all of the elements identified by the Court in Haslip. The instruction adequately conveyed that punitive damages are to punish the defendant and deter it and others from similar conduct in the future. See App. at 1777-78 ("it should

be an award which stings [i.e. punishes] the defendant and will act as a deterrent to such conduct by the defendant in the future and a warning to others"). The district court also told the jury that it was not required to award punitive damages, and that they are "allowed only for wanton and reckless behavior ... [where] defendant's conduct was outrageous because done with an evil motive or done with reckless indifference to the rights of others." App. at 1776.

Other courts of appeals have approved similar jury charges as providing due process under Haslip. See Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1097 (5th Cir. 1991), cert. denied, 112 S. Ct. 1778 (1992); American Employers Ins. v. Southern Seeding Svc., Inc., 931 F.2d 1453, 1457-58 (11th Cir. 1991). But see Mattison v. Dallas

Carrier Corp., 947 F.2d 95, 105-06 (4th Cir. 1991). While we acknowledge that the district court could have given the jury more guidance on the issue of punitive damages,[20] we cannot conclude that the charge was constitutionally defective.

The second inquiry made by the Court in Haslip was whether the post-trial procedures ensure "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." 111 S. Ct. at 1044. Of course, if a charge is fatally defective, it will not be cured by post-trial

---

[20] Under the Restatement, in determining the amount of punitive damages, the trier of fact can consider such factors as (1) the act itself, including the motives of the wrongdoer, the relations between the parties, and provocation or want of provocation; (2) the extent of harm to the injured person, including the expense to which plaintiff has been put in bringing a lawsuit; (3) the wealth of the defendant; and (4) the existence of multiple claims. Restatement (Second) of Torts §908 cmt. e (1977).

review. We have found no fatal defect. Nonetheless the scope of both trial court and appellate review were significant features in the Court's approval of the Haslip jury's punitive damage award, and thus we consider those applicable here.

In Haslip, the Court noted that under the applicable Alabama precedent, the factors a trial court considers in scrutinizing a jury verdict for excessiveness of the damages are "the 'culpability of the defendant's conduct,' the 'desirability of discouraging others from similar conduct,' the 'impact upon the parties,' and 'other factors, such as the impact on innocent third parties.'" 111 S. Ct. at 1044 (quoting Hammond v. City of Gadsden, 493 So. 2d 1374, 1379 (Ala. 1986).

Under federal law as well, a district court reviews damages awards for

excessiveness, see Kazan v. Woltnski, 721 F.2d 911, 914 (3d Cir. 1983) (remittitur available only when "so large as to shock the conscience of the court"). The district court in this case appropriately applied this standard, see Dunn, 774 F. Supp. at 950, and indeed ordered a remittitur and provided reasons for that decision. OCF complains that the trial court did not review the jury award de novo, but only gave it substantial deference. The court stated that it would "remit the portion of the verdict in excess of the maximum amount supportable by the evidence." Id., (quoting Kazan, 721 F.2d at 914). Nothing in Haslip requires more.

We recognize that in Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991), the court held that the procedure applied under South Carolina

law to punitive damages awards did not provide due process and that Virgin Islands procedure is similar in that neither jurisdiction mandates a set of criteria a jury must consider when calculating punitive damages. We are unpersuaded by Mattison. Instead, we agree with the holding in Glasscock, 946 F.2d at 1098-99, a diversity case involving Texas law, that federal post-trial review under Rules 50 and 59 and federal appellate review of a jury award provide sufficient constraint on a jury's discretion to satisfy the requirements of due process. See also Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377, 1380-86 (5th Cir. 1991) (same, in diversity case applying Missouri law).

Although the court in Mattison concluded that the standards for calculating punitive damages awards were

unconstitutionally vague, relying on Giaccio v. Pennsylvania, 382 U.S. 399 (1966), see Mattison, 947 F.2d at 102-03, this precise argument was rejected by the Court in Haslip, which distinguished Giaccio on the ground that it concerned the imposition of liability rather than the jury's discretion in fixing the amount of damages or costs. 111 S. Ct. at 1046 n.12. Furthermore, we deem it significant that under the Virgin Islands law (as under South Carolina law) a plaintiff must establish liability for punitive damages by clear and convincing evidence, a higher burden than under the Alabama scheme upheld in Haslip which only required proof by a preponderance of the evidence. See id. at n.11 (specifically declining to hold that due process required a greater standard of proof).

Finally, we underscore the "fact intensive nature of the due process analysis articulated in Haslip." Eichenseer, 934 F.2d at 1386. In this case after the district court reviewed the record and determined that the evidence supported a finding of willfulness and wantonness on OCF's part, see Dunn, 774 F. Supp. at 948-49, it considered OCF's net worth, the relationship between the size of the compensatory award and its remitted punitive damages award,[21] and the size of such awards in other cases in

---

[21] Specifically, the district court concluded that $2 million was an appropriate amount to offer in remittitur as "th[is] sum is rationally related to the $500,000 in compensatory damages without having exceeded the multiple of four constitutionally permitted by the Supreme Court in Haslip." Dunn, 774 F. Supp. at 951 (citation omitted). In Haslip the Court found the punitive damages award in that case to be reasonable even though it exceeded the compensatory award by four times because "it d[id] not cross the line into the area of constitutional impropriety." 111 S. Ct. at 1046.

determining that remittitur was appropriate. See id. at 951. This independent review led the court to conclude that a $2 million dollar award would both act as an adequate punishment and deterrent.[22] These factors considered in post-trial review were approvingly referred to in Haslip, and serve as an effective counterpoint to the wide discretion given the jury.[23]

---

[22] We recommend that in the future district courts explicitly assess the amount of a punitive damages award in light of the factors set out in comment e of the Restatement. See supra, note 20.

[23] In Haslip, the Court listed the factors considered under Alabama law in post-trial and appellate review:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the

The third check referred to by the Haslip Court on the jury's or trial court's discretion was the Alabama Supreme Court's review of punitive awards. We will perform an analogous function in the next section. The Constitution requires no more.

4. Excessiveness of the Punitive Damages Awarded

> defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

111 S. Ct. at 1045. In addition, the Alabama Supreme Court conducts a comparative analysis. Id.

In satisfying itself of the reckless character of OCF's relationship between the size of the compensatory and punitive awards, the district court found evidence to support three of the factors listed above (i.e. factors (a), (b) and (d)). It also conducted a comparative analysis. This review was enough to support the award of punitive damages in this case. See Eichenseer, 934 F.2d at 1382-84 (evidence in record sufficient to satisfy three of seven Haslip factors, and thus "the record in this case provides sufficient support for the award of punitive damages").

OCF's remaining contentions, although included under different headings, all are directed to OCF's claim that the punitive award is excessive. OCF first argues that the jury award was the result of passion, prejudice, or bias, and that it was an abuse of discretion for the district court not to have ordered a new trial unconditionally rather than to condition the grant of a new trial on Dunn's acceptance of a remitted damages award. If OCF had shown that the jury verdict resulted from passion or prejudice, we agree that a new trial would have been the proper remedy rather than remittitur. See Mason v. Texaco, Inc. 948 F.2d 1546, 1561 (10th Cir. 1991), cert. denied, 112 S. Ct. 1941 (1992); Hale v. Firestone Tire & Rubber Co., 820 F.2d 928, 936 (8th Cir. 1987); Westbrook v. General Tire & Rubber Co.,

754 F.2d 1233, 1241 (5th Cir. 1985); Brown v. McBro Planning & Dev. Co., 660 F.Supp. 1333, 1337 (D.V.I. 1987); Schreiffler v. Board of Educ., 508 F. Supp. 1300, 1308 (D. Del. 1981); see also 6A James W. Moore et al., Moore's Federal Practice ¶59.08[7] (2d ed. 1991).

We are unwilling to accept OCF's argument that the size of the award alone was enough to prove prejudice and passion. Even if there were some level of award that would in itself constitute an indication of prejudice and passion, see Auster Oil & Gas, Inc. v. Stream, 835 F.2d 597, 603 n.5 (5th Cir.), cert. denied, 488 U.S. 848 (1988); Wells v. Dallas Indep. Sch. Dist. 793 F.2d 679, 684 (5th Cir. 1986), we cannot hold that the $25 million award here necessarily indicates a verdict tainted by prejudice and passion in light of the evidence

before the jury concerning OCF's knowledge of the health hazards associated with asbestos, OCF's net after-tax earnings for the three years prior to trial averaged almost $200 million, and OCF's net worth of approximately $2.2 billion.[24] App. at 1743. See Mason, 948 F.2d at 1560 ($25 million punitive damages award to one plaintiff not product of passion and prejudice).

A multi-million dollar punitive damages award is not unique in products

---

[24] In Cash v. Beltmann N. Am. Co., 900 F.2d 109, 111 n.3 (7th Cir. 1990), the court, after reviewing several punitive damage awards cases, concluded that "a typical ratio for a punitive damages award to a defendant's net worth [is] around one percent." The jury's $25 million award (approximately 1% of OCF's $2.2 billion net worth) certainly fell within this range. See Gregg v. U.S. Indus., Inc., 887 F.2d 1462, 1477 (11th Cir. 1989) (approving $2 million punitive damages award which represented "4% of [defendant's] net worth of $520 million"]; Burke v. Deere & Co., 780 F. Supp. 1225, 1238 (S.D. Iowa 1991) (remitting $50 million punitive damages award to $28 million, approximately 1% of defendant's $2.8 billion net worth).

liability cases. See e.g., Glasscock, 946 F.2d at 1095 ($6.1 million jury verdict in asbestos case); O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1446-47 (10th Cir. 1987) ($10 million jury verdict to single plaintiff injured by defective tampons), cert. denied, 486 U.S. 1032 (1988); Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1571 (6th Cir. 1985) ($1.5 million jury verdict against asbestos manufacturer) cert. denied, 478 U.S. 1021 (1986); Kociemba v. G.D. Searle & Co., 707 F.Supp. 1517, 1535-38 (D. Minn. 1989) (approving $7 million jury verdict against manufacturer of defective intrauterine contraceptive device); Palmer v. A.H. Robins Co., 684 P.2d 187, 220-21 (Colo. 1984) (approving $6.2 million jury award to woman harmed by Dalkon Shield).

We have held that "where no clear judicial error or 'pernicious influence' can be identified but where the verdict is so large as to shock the conscience of the court," the appropriate action for the court is to "order [the] plaintiff to remit the portion of the verdict in excess of the maximum amount supportable by the evidence or, if the remittitur [is] refused, to submit to a new trial." Kazan v. Wolinsky, 721 F.2d 911, 914 (3d Cir. 1983). We, as well as other courts, have sustained remittiturs involving ratios to jury punitive damage awards comparable to that ordered here. See Walters v. Mintec/Int., 758 F.2d 73, 80 (3d Cir. 1985) (10 to 1 ratio); see also Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 389-90 (Cal. App. 4th 1981) (remittitur of $125 million to $3.5 million; over 30 to 1 ratio); Burke v.

Deere & Co., 780 F.Supp. 1225, 1238 (S.D. Iowa 1991) (remittitur of $50 million to $28 million); Mason, 948 F.2d at 1561 (remittitur of $25 million to $12.5 million); Republic Ins. Co. v. Hires, 810 P.2d 790, 792-93 (Nev. 1991) (remittitur of $22.5 million to $5 million); Gregg v. U.S. Indus., Inc., 887 F.2d 1462, 1477 (11th Cir. 1989) (remittitur from $18.5 to $2 million; over 9 to 1 ratio); State Farm Mut. Auto. Ins. Co. v. Zubiate, 808 S.W.2d 590, 606 (Tex. Civ. App. 1991) (remittitur of $15 million to $660,000; over 20 to 1 ratio), writ denied, (Sept. 18, 1991); West v. Johnson & Johnson Prods., Inc., 220 Cal. Rptr, 437, 462 (Cal. Ct. App. 1985) (remittitur of $10 million to $1 million; 10 to 1 ratio), cert. denied, 479 U.S. 824 (1986); Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826, 836-37 (Minn. 1988) (remittitur of

$12.5 million to $4 million), cert. denied, 492 U.S. 926 (1989).

If an excessive jury determination were per se proof of passion, prejudice, or bias, there would have been no reason for the Supreme Court to have said in Haslip that "[t]he Alabama Supreme Court's post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." 111 S. Ct. at 1045. We conclude that OCF has failed to prove that the jury's $25 million verdict, admittedly quite large, was the result of passion and prejudice mandating a new trial.

OCF argues that the $2 million remitted punitive damages award was excessive and should be remitted further, focusing primarily on its claims that it

has been required to pay punitive damages awards in the past and that many suits are currently pending against it. In Acosta, 717 F.2d at 839 n.17, although we noted that "a jury might decide that a defendant's financial position, as a result of other awards of punitive damages for the same conduct, is so precarious that a sizeable award of punitive damages would be inappropriate," we declined to disapprove of multiple punitive damages awards against a manufacturer of a harmful product. Id. at 838-39. In this case, OCF made the strategic decision not to introduce into evidence before the jury information concerning other punitive damages awards assessed against it. Had it done so, the jury might have made a smaller award.

In its post-trial submissions OCF did include a list and description of

other punitive damages jury verdicts entered against it, App. at 1944-49, [25], and data on punitive damages verdicts in asbestos cases generally. See App. at 1842-1939. There is nothing in the district court's opinion that supports OCF's contention that when the trial court calculated its remitted punitive damages award, it refused to consider other such awards against OCF because that evidence should have been presented to the jury.

Nor does OCF point to anything in the record to indicate that the trial court set the remitted damages figure in consideration of OCF's conduct other than with respect to the harm it caused Dunn. Recently, several courts have concluded

---

[25] OCF did not provide any data on the actual amount it has paid on those claims.

that an asbestos manufacturer's due process rights were not violated "because the evidence demonstrated that the punitive damage awards were only for the harm inflicted upon the specific plaintiffs in each case." Owens-Illinois v. Armstrong, 591 A.2d 544, 557 (Md. Ct. Spec. App. 1991), aff'd in part and rev'd in part, 604 A.2d 47 (Md. 1992); see also King v. Armstrong World Indus., Inc., 906 F.2d 1022, 1030 (5th Cir. 1990), cert. denied, 111 S. Ct. 2236 (1991); Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 281 (2d Cir.), cert. dismissed, 111 S. Ct. 27 (1990); Man v. Raymark Indus., 728 F. Supp. 1461, 1466 (D. Hawaii 1989); Eagle-Picher Indus., Inc. v. Balbos, 604 A.2d 445, 472 (Md. 1992). In fact, the district court explicitly referred to the amount of the compensatory damages awarded when it calculated the amount of

its remitted punitive damages award, thus demonstrating that the punitive damages award only represents punishment for OCF's conduct with respect to Dunn.[26]

OCF argues that its "negative net worth" militates against a large punitive damages award. As Dunn's expert witness testified, OCF's large indebtedness was incurred to ward off a take-over attempt in 1986, App. at 1740-41, and thus obscures the company's true value. He estimated OCF's value at the time of trial to be around $2.2 billion, App. at 1743, basing this figure on OCF's annual average after-tax earnings for the three years prior to trial of approximately

---

[26] The district court's charge that the jury only award punitive damages if "plaintiff has clearly and convincingly established that the action of the defendant which caused injury to the plaintiff was wanton and reckless," see app. at 1776 (emphasis added), further reveals the court's awareness that punitive damages were to be assessed only with respect to the harm OCF caused Dunn.

$200 million. Thus, the $2 million award was well within OCF's ability to pay.

It is evident to us that the Supreme Court in Haslip approved review by an appellate court to "determin[e] whether a particular award is greater than reasonably necessary to punish and deter." 111 S. Ct. at 1046. With this in mind we consider the effect of successive punitive damages awards in mass tort cases arising from the same course of conduct.[27] We, as well as other courts, have expressed similar concerns. See In re School Asbestos Litig., 789 F.2d 996, 1005 (3d Cir.) ("powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some

---

[27] This issue was discussed at oral argument at the request of the court, which also accepted supplemental briefing directed thereto.

responsibility for preventing repeated awards of punitive damages for the same acts or series of acts"), cert. denied, 479 U.S. 852 (1986); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838-42 (2d Cir. 1967); see also In re Federal Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir.) (Heaney, J., dissenting), cert. denied, 459 U.S. 988 (1982); Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1056 (D.N.J.), modified, 718 F. Supp. 1233 (D.N.J. 1989); In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983), mandamus denied, 725 F.2d 858 (2d Cir.), cert. denied, 465 U.S. 1067 (1984).

Nevertheless, the vast majority of courts that have addressed the issue have declined to strike punitive damages awards despite claims they constituted repetitive punishment for the same

conduct. See Simpson, 901 F.2d at 280-82 (construing New York law); Jackson, 781 F.2d at 402-07 (construing Mississippi law); Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036, 1041-42 (5th Cir. 1984) (construing Texas law), cert. denied, 470 U.S. 1051 (1985); Neal v. Carey Canadian Mines, Ltd., 548 F.Supp. 357, 376-77 (E.D. Pa. 1982) (construing Pennsylvania law), aff'd 760 F.2d 481 (3d Cir. 1985); Man, 728 F.Supp. at 1465-68 (construing Hawaii law); Campell v. ACandS, Inc., 704 F. Supp. 1020, 1021-23 (D. Mont. 1989) (construing Montana law).

OCF argues that the volume of asbestos claims currently before the courts and likely to be filed in the future shows that the point of "overkill" has been reached with respect to punitive damages in asbestos litigation. OCF claims that asbestos manufacturers have

been punished enough, and that the "avalanche" of compensatory claims is more than sufficient to serve the goals of deterrence and punishment. It urges this court, as the "Supreme Court of the Virgin Islands," to strike punitive damages claims in all asbestos cases in the Virgin Islands.

As an initial matter, we question whether this court represents the appropriate forum for determining whether the imposition of successive claims of punitive damages in mass tort litigation should be allowed. See Man, 728 F.Supp. at 1466 ("it would be manifestly improper for any court to unilaterally legislate away established rights and procedures based on ... interpretation of public policy goals"); see also Robert E. Riggs, Constitutionalizing Punitive Damages: The Limits of Due Process, 52 Ohio St. L.J.

859, 914 (1991) ("assuming that the present system of punitive damages has serious negative consequences for society, a remedy is more appropriately sought by legislative rather than by judicial means").

In addition, as we recognized in Government of the Virgin Islands v. Harris, 938 F.2d 401 (3d Cir. 1991),

> [a]bsent governing statute or precedent, a "hierarchy of sources for Virgin Islands law" is found under V.I. Code Ann. tit. 1 §4 (1967). Edwards v. Born, Inc., 792 F.2d 387, 389 (3d Cir. 1986). Under §4, we look first to the common law rules set forth in the various Restatements. If no rules are available, we look to common law rules "as generally understood and applied in the United States." Id. See also Poltus v. Clark Equipment Co., 802 F.2d 75, 77 (3d Cir. 1986) (Where the Virgin Islands "has no governing statute ... [and] [w]here the Restatement is silent and a split of authority exists, courts should select the sounder rule").

Id. at 411.

The Restatement, which we are obliged to consult in exercising whatever common law authority we have in this case, does not preclude successive claims of punitive damages arising out of the same course of conduct, although it permits consideration of the existence of multiple punitive damages claims against a defendant in assessing damages. See Restatement (Second) of Torts §908 cmt. e (1977). Moreover, courts on the mainland, particularly from the other jurisdictions comprising the Third Circuit, have declined to strike repetitive punitive damage claims and awards in asbestos cases. Therefore, there is no basis for us to treat the similar awards to Virgin Islands citizens any differently.

We do not disagree with the concerns about punitive damages awards,

particularly in the asbestos cases, expressed by our dissenting colleague Judge Weis. We differ instead as to whether it is the judiciary, and particularly a panel of judges in an individual case, that should resolve the conflicting policy arguments. We eschew the activist role the dissent would place on us. Any action along that policy line is better left to Congress or the Legislature of the Virgin Islands.

To the extent that OCF claims that punitive damages in asbestos cases are as a general matter unconstitutional, we are not persuaded by its arguments. While we recognize that some courts and commentators have called for the abolition of punitive damages altogether, see, e.g. John Dwight Ingram, Punitive Damages Should be Abolished, 17 Cap. U.L. Rev. 205 (1988); James B. Sales & Kenneth

B. Cole, Jr., Punitive Damages: A Relic That Has Outlived Its Origins, 37 Vand. L. Rev. 1117 (1984), that position is not without its critics. In fact, several commentators have challenged the popular notion that "[a]wards of punitive damages are skyrocketing." Browning Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part).

The author of a comprehensive empirical study of punitive damages awards in products liability cases concluded that both the frequency and size of punitive damages awards is "much less" than is generally believed. Michael Rustad, Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts 28 (Papers of the Roscoe Pound

Found. 1991) [hereinafter "Demystifying Punitive Damages"];[28] cf. Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 13 (1990) (noting that "the punitive damages debate has become a matter of public relations, propaganda, and the mobilization of prejudice and fear, rather than a matter of rationale discourse") [hereinafter "Myth and Reality"]. While the data show that the frequency with which punitive damages are awarded in asbestos cases has risen in the five year period between 1985-1990, they also demonstrate that punitive

---

[28] After conducting an exhaustive search of several sources including published opinions, computer-data bases, law reviews and legal commentaries, court records, trial verdict reporters, and interviews with lawyers involved in products liability cases, see Demystifying Punitive Damages at 2-4, Rustad and his associates located a total of 355 products liability cases involving punitive damages awards throughout the country in the quarter century from 1965-1990.

damages awards in asbestos cases tend to be much smaller than such awards in other kinds of products liability cases. See Demystifying Punitive Damages at 30; cf. Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System - And Why Not?, 140 U. Pa. L. Rev. 1147, 1256 (1992) (noting that while mean (i.e. average) size of punitive damages verdicts has increased due to a "very few cases with exceptionally large awards," median awards have risen only moderately) [hereinafter "Behavior of the Tort System"]; Myth and Reality, 75 Minn. L. Rev. at 39-43 (concluding that median size of punitive damages awards is quite modest).

Moreover, it has been reported that in those relatively rare cases in which

punitive damages are awarded at all,[29] these awards are frequently reduced on appellate review. Demystifying Punitive Damages at 30-32; Behavior of the Tort System, 140 U. Pa. L. Rev. at 1158-62. In addition, Rustad has concluded that "[t]he difference between punitive damages awarded and punitive damages paid is often dramatic." Demystifying Punitive Damages at 32. Finally, OCF itself candidly admits that in the vast majority of the asbestos cases against it which go to trial, plaintiffs come up empty. See Appellant's Supplemental Brief at 11 (citing App. at 1943); see also App. at 1842-1939.

---

[29] In a study of punitive damages verdicts in 47 counties in 11 states, the authors noted that only 8.9% of successful products liability plaintiffs were also awarded punitive damages. See Myth and Reality, 75 Minn. L. Rev. at 38; see also Demystifying Punitive Damages at 24 (noting that while approximately 200,000 American women were injured by Dalkon Shield, there were only 11 punitive damages awards).

We make these observations simply to note that the facts underlying the issue of punitive damages in mass tort cases are far from clear, despite high profile commentary in that connection. In this case, OCF has failed to submit evidence concerning the actual amount it or other asbestos manufacturers have actually paid to satisfy punitive damages verdicts and simply has not made a "showing that the total [amount of punitive damages assessed so far] is even close to whatever limit due process might impose on the total punitive damages that may be assessed ... for ... misconduct with respect to asbestos warnings." Simpson, 901 F.2d at 281;[30] see Restatement

---

[30] We also agree with the conclusion in Simpson that all asbestos cases involving a single defendant cannot "be lumped together for the purpose of testing punitive damages against the limits of due process." 901 F.2d at 281. "The wrongfulness of a defendant's conduct will normally be subject to varying assessments

(Second) of Torts §908 cmt. a (1977); cf. Campbell, 704 F.Supp. at 1023 ("the desired effect is to deter all individuals or entities involved in the manufacture and distribution of consumer products from placing the public at risk by engaging in similar conduct").

OCF has not shown on this record that either it or the asbestos industry as a whole will be unable to satisfy current and future asbestos claims. Cf. Man, 728 F. Supp. at 1467 (noting that in case of bankrupt manufacturers, "bankruptcy court may conceive an equitable plan for creditors"). Although the costs associated with asbestos litigation may have wiped out any profits

---

depending on the degree to which the dangers of its product were known at a particular time and the deliberateness of its conduct in declining to warn or even concealing the dangers of which it was aware." Id.

OCF made from the sale of its Kaylo product, OCF failed to submit any evidence at trial concerning the profitability of its Kaylo product,[31] or concerning the profits of the other manufacturers. In any event, neither Virgin Islands law nor due process requires striking all punitive damages claims simply because the harm caused by a defective product was so severe as to wipe out all profit.

Despite these conclusions, we agree with OCF that further remittitur of the punitive damage award in this case is appropriate. See Gumbs, 823 F.2d at 773-

---

[31] It was only in its appendix to its supplemental brief to this court that OCF made any claim concerning the profitability of its Kaylo product. See Appellant's Supplemental Brief, Appendix D at 6-7 (estimating total sales at $142.7 million with total profit ranging from $1.4 million to $7.7 million). We are unwilling to act on the basis of such evidence, which was not before the district court and which was not subject to challenge by appellee.

75; Williams v. Martin Marietta Alumina, Inc., 817 F.2d 1030, 1040-41 (3d Cir. 1987); Walters, 758 F.2d at 82. In reaching this conclusion, we take into consideration all the factors listed in comment e to Restatement of Torts (Second) §908: the defendant's wealth, its act, the extent of harm, and the multiplicity of claims, and, as approved in Haslip, the comparative analysis of punitive damages awards in similar cases.

Our review of the list of jury verdicts submitted by OCF to the district court indicates to us that even the $2 million dollar figure greatly exceeds the level of punitive damages awarded in other similar asbestos cases. In addition, Dunn has thus far been spared the more severe forms of asbestos-related diseases (e.g. lung cancer, mesothelioma). It is difficult to

justify the district court's remitted $2 million award in light of the extent of Dunn's harm, consisting of at most asbestosis as well as pleural thickening. Most significant, while we commend the district court's discipline in reducing the punitive damages from $25 million to $2 million, we note that the court does not seem to have taken into consideration the effect of successive punitive awards in asbestos litigation. This factor, above all, leads us to conclude that the maximum amount of punitive damages that could reasonably have been awarded in this case is $1 million.

IV.

CONCLUSION

For the foregoing reasons we will affirm the district court's order denying OCF's motion for Judgment NOV and remitting the compensatory damage award

to $500,000. However, the judgment of punitive damages will be vacated and the case remanded to the district court for a new trial on the issue of the amount of punitive damages unless Dunn elects to file a remittitur of the punitive damages in excess of $1,000,000 since that is the maximum amount of punitive damages that we find could reasonably have been awarded in this case. OCF to bear all costs on appeal.

WEIS, Circuit Judge, dissenting.

I dissent from the judgment of the court allowing punitive damages and I would reduce the amount of the compensatory award.

I.

PUNITIVE DAMAGES

Asbestos litigation is unique. The larger number of persons exposed to

asbestos has caused a proliferation of claims, the likes of which courts have never seen, causing serious concern that the traditional tort system cannot adequately process the litigation. As this Court said in In re School Asbestos Litigation, 789 F.2d 996, 1000 (3d Cir. 1986), asbestos litigation presents "an unparalleled situation in American tort law."

In 1986, an estimated 30,000 personal injury suits had been filed against asbestos manufacturers and producers. Id. That figure has since increased substantially. The Judicial Conference Ad Hoc Committee on Asbestos Litigation reported that in 1990, 30,401 asbestos cases were pending in the federal courts alone, and about double that amount in the state courts, for a total of approximately 90,000 cases.

Judicial Conference Ad Hoc Comm. on Asbestos Litig., Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States (Mar. 1991), reprinted in Asbestos Litig. Rep., March 14, 1991, at 22,698, 22,702-03.

As might be expected, the flood of asbestos cases has taken its toll on the defendants. The Ad Hoc Committee reported that of the 25 major asbestos companies, 11 had filed petitions in bankruptcy. Id. at 22,705. In another study, a knowledgeable commentator reports that, "[a]s of July 1991, approximately fourteen former manufacturers of asbestos products had filed for bankruptcy. This number does not include the numerous smaller distributors that have been targeted in the wake of absent manufacturers and who

have in turn become insolvent." Peter H. Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harv. J.L. & Pub. Pol'y 541, 555 (1992).

The number of claims and bankruptcy filings have created the likelihood that future claimants will not be able to recover for their injuries. As the Ad Hoc Committee said:

> "[A] large number of individuals have claims ... that are not yet ripe for adjudication. Because many of the defendants in these cases have limited assets that may be called upon to satisfy the judgments obtained under current common tort rules and remedies, there is a 'real and present danger that the available assets will be exhausted before those later victims can seek compensation to which they are entitled.' Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1330 (5th Cir. 1985). cert. denied, 478 U.S. 1022 (1986)."

Judicial Conference Ad Hoc Comm., supra, at 22,715-16. As one of its

recommendations to Congress, the Committee suggested legislation "requiring treatment of available assets to take into account future claimants." Id. at 22,716.

It is not only claims for personal claims for personal injuries and deaths resulting from asbestos that have substantially diminished the pool of resources. In addition, thousands and thousands of property damage cases further threaten the available funds. See, e.g. In re Sch. Asbestos Litig., 789 F.2d at 1005.

The first of the major asbestos manufacturers to enter bankruptcy was Johns-Manville which sought to use Chapter 11 essentially as a giant interpleader action. As part of the Manville reorganization, a trust was created to settle pending and future

asbestos claims. Although the trust concept had the potential for equitably distributing assets to present and future claimants, the bankruptcy proceeding was itself very expensive and the results ultimately proved to be unsatisfactory.

Although punitive damages were not allowed, the trust was essentially insolvent after operating for only a year and a half. In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 754 (E. & S.D. N.Y. 1991). An Associated Press report of March 18, 1992, stated that the trust had received 192,347 claims. Stefan Fatsis, Lower Sums for Victims of Asbestos, Associated Press, March 18, 1992. A Special Master reported that the trust's funds of approximately $2.6 billion were overshadowed by present and future liabilities estimated as high as $7 billion. See In re Joint E. & S.

Dist. Asbestos Litig., 129 B.R. at 765. The swift depletion of assets was caused by high transaction costs, the failure to anticipate the magnitude of claims that would be filed, and the fact that the average settlement was much higher than expected. Id. at 754-62. Additionally, the trust paid on a first come, first served basis, rather than on priority determined by the extent of injury.

The district court intervened to impose measures for a more equitable distribution of the funds and eventually approved an arrangement that altered the distribution process so that those most seriously injured were paid first. Id. at 768-70. In addition, a serious attempt was made to predict future claims so that present and future claimants would be paid an equitable percentage of their claims' value. Id.

In commenting on the settlement, the district court noted the grim prospects for future asbestos claimants in the absence of a solution. The current defendants "do not have, and they probably will not have, assets to pay for their current and contingent asbestos liabilities given the present mode of disposing of asbestos claims." Id. at 907. The Manville experience, thus, is evidence that even purely compensatory payments for future claims are in jeopardy.

It is important to keep in mind that punitive awards are allowed only after full compensation has been awarded. Thus, punitive damages are a windfall to plaintiffs. Elimination of punitive damages would not diminish compensatory verdicts.

The Ad Hoc Committee cited a 1984 Rand study reporting that in a sample period between 1980 and 1982, punitive damages totalling $4,934,000 had been awarded in asbestos cases. Judicial Conference Ad Hoc Comm., supra, at 22,724 n.54. More recent figures are substantially higher. In testimony before a House Subcommittee on February 26, 1992, Judge William Schwarzer, the Director of the Federal Judicial Center, said:

> "[P]unitive damages compete with compensatory damages for the increasingly scarce resources of asbestos defendants and their insurers. Until the claims of future claimants become liquidated, distribution of punitive damages to current claimants creates a risk of exhausting funds before potential claimants discovery their injuries. Some mechanism to avoid this outcome, at least until more precise information becomes available about future claims, may be necessary for a national solution that has meaning for future claimants."

Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Com. on the Judiciary, 103d Cong., 1st Sess. (1992) (statement of Hon. William W. Schwarzer).

Judge Schwarzer also noted that less than 1% of asbestos cases proceed to judgment. Only in that small percentage of cases can punitive damages be recovered, and they are not awarded in every case even though the same defendant and the same conduct is at issue. Nevertheless, the potential for punitive damages is a weighty factor in the negotiations for settlement. The threat of punitive damages being awarded inevitably results in an agreement on a larger sum than would ordinarily be obtained. To the extent that this premium exceeds what would otherwise be a fair and reasonable settlement for

compensatory damages, assets that could be available for satisfaction of future compensatory claims will be dissipated.

A minority of the Court of Appeals for the Fifth Circuit forcefully raised the issue of whether the asbestos industry's resources would be inadequate to compensate future claimants. Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1330 (5th Cir. 1985) (Clark, J., joined by four others dissenting). A majority of that Court decided to certify to a state court the question of whether plaintiffs could recover punitive damages in asbestos cases. The dissenting judges, arguing that the problem was national in scope, advocated taking a more forceful stand. Noting that the "field of asbestos litigation [had] exploded," the dissent pointed out that an "already astronomical and still

growing number of plaintiffs [are] seeking individual recoveries against a finite pool of assets belonging to a relatively small group of defendants." 750 F.2d at 1330.

Taking issue with the decision to certify the question to the state court, the dissent observed that "[a] state seeking to protect its own citizens can only shape its law to maximize the recovery of its own early plaintiffs, so that at least those individuals will not be impeded in the legal scramble for a share of insufficient assets." Id.

The situation has only worsened since the time of the Jackson opinions, and a panel of that same Court in 1990 conceded its "misgivings" over awarding punitive damages in asbestos cases, but found itself shackled by binding precedent. King v. Armstrong World

Indus., 906 F.2d 1022, 1033 (5th Cir. 1990).

As the Jackson dissent commented and as we discussed in In re School Asbestos Litigation, 789 F.2d at 1001, parochial concerns tend to influence the decision to make punitive damages available in cases of this nature. That approach was apparent, for example, in Fischer v. Johns-Manville Corp., 512 A.2d 466 (N.J. 1986). In discussing the suggestion that a limitation on punitive awards be imposed, the Fischer court said, "[s]uch a cap would be ineffective unless applied uniformly. To adopt such a cap in New Jersey would be to deprive our citizens of punitive damages without the concomitant benefit of assuring the availability of compensatory damages for later plaintiffs. This we decline to do." Id. at 478. What the opinion

failed to acknowledge was that awarding windfall punitive damages to early plaintiffs poses the likely prospect that some future New Jersey plaintiffs will be unable to recover compensatory damages for their injuries.

The New Jersey Supreme Court also stated that it failed "to see the distinction, in the case of Johns-Manville [before its bankruptcy], between the effect of compensatory damages and that of punitive damages." Id. at 477. To some extent, the Court was correct. Every dollar expended on punitive damages, as well as those expended in compensatory damages, will diminish, eventually to the point of exhaustion, any resources available for paying future plaintiffs' claims. There is, however, an important distinction. Compensatory awards are a remedy for injuries

suffered. Punitive damages are not. A dissenting justice in Fischer posed an apt rhetorical question: "But why, for example, should a few Dalkon Shield users receive several millions in punitive-damages awards, while others receive nothing from the bankrupt A. H. Robins Co.?" Id. at 488 n.3 (O'Hern, J., dissenting).

Unquestionably, a national solution is needed, but Congress has declined to act despite the deteriorating situation. In the meantime, the drain on available resources continues. It is time - perhaps past due - to stop the hemorrhaging so as to protect future claimants.

This Court is confronted for the first time with an asbestos case under Virgin Islands law where punitive damages have been awarded. We are in a position

similar to that of state supreme courts in determining the common law applicable within this jurisdiction and in applying the Restatements. We have a clean slate, and are not bound by mistaken determinations in other jurisdictions.

The Restatement (Second) of Torts § 908(2) provides that "[p]unitive damages *may* be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." (emphasis supplied). Comment a explains that "[t]he purposes of awarding punitive damages...are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future."

The desirability of allowing punitive damages has been subjected to vigorous assault in recent years.

Specifically, whether the theories underlying punitive damages hold true in the mass tort context has been questioned in such cases as: In re Bendectin Prod. Liab. Litig., 749 F.2d 300, 305-07 (6th Cir. 1984); In re N. Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig., 693 F.2d 847, 851-52 (9th Cir. 1982); In re Fed. Skywalk Cases, 680 F.2d 1175, 1179-83 (8th Cir. 1982); In re Agent Orange Prod. Liab. Litig., 100 F.R.D. 718, 725 (E.D. N.Y. 1983). In none of those cases, however, did the problem match the magnitude of the asbestos litigation crisis.

I do not propose to enter the debate here over the desirability of punitive damages in general.[32] For purposes of

---

[32] For a representative - by no means complete -- sample of articles, see Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37 (1983);

Special Project, An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation, 36 Vand. L. Rev. 573 (1983); Jones, et al., Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process, 43 Ala. L. Rev. 1 (1991); Symposium, Punitive Damages, 40 Ala. L. Rev. 687 (1989); Symposium, Punitive Damages, 56 S. Cal. L. Rev. 1 (1982).

For articles favoring abolition, see: Carsey, The Case Against Punitive Damages: An Annotated Argumentative Outline, 11 Forum 57 (1975); Dubois, Punitive Damages: Bonanza or Disaster, 3 Litig. 35 (Fall 1976); Ghiardi, The Case Against Punitive Damages, 8 Forum 411 (1972); Ghiardi, Should Punitive Damages Be Abolished? -- A Statement for the Affirmative, 1965 A.B.A. Sec. Ins., Negl. & Comp. L. Proc. 282; Long, Punitive Damages: An Unsettled Doctrine, 25 Drake L. Rev. 870 (1976); and Sales & Cole, Punitive Damages: A Relic That Has Outlived Its Origins, 37 Vand. L. Rev. 1117 (1984).

For articles favoring modification, see Barrett & Merriman, Legislative Remedies for Punitive Damages, 28 Fed. Ins. Couns. J. 339 (1978); Bell & Pearoe, Punitive Damages and the Tort System, 22 U. Rich. L. Rev. 1 (1987); Johnston, Punitive Liability: A New Paradigm of Efficiency in Tort Law, 87 Colum. L. Rev. 1383 (1987); Launie, The Incidence and Burden of Punitive Damages, 53 Ins. Couns. J. 46 (Jan. 1986); Levit, Punitive Damages: Yesterday, Today and Tomorrow, 1980 Ins. L. J. 257; Mallor & Roberts, Punitive Damages: Toward a Principled Approach, 31 Hastings L. J. 639 (1980); Martin, The Relation of Exemplary Damages to Compensatory Damages, 22 Tex. L. Rev. 235 (1944); McCormick, Some Phases of the Doctrine of Exemplary Damages, 8 N.C. L. Rev. 129 (1930); Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1183 (1931); Phillips, The Punitive Damage Class Action: A Solution to the Problems of Multiple Punishment, 1984 U. Ill. L. F. 153 (1984); Priest, Punitive Damages

this case, I accept the premise that in appropriate cases punitive damages may be assessed in the Virgin Islands. See Restatement (Second) of Torts § 908(2);[33] Acosta v. Honda Motor Co., 717 F.2d 828, 833-41 (3d Cir. 1983).

---

and Enterprise Liability, 56 S.C. L. Rev. 123 (1982); Riley, Punitive Damages: This Doctrine of Just Enrichment, 27 Drake L. Rev. 195 (1977-1978); Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269 (1983); and Woodbury, Limiting Discovery of a Defendant's Wealth When Punitive Damages Are Alleged, 23 Duq. L. Rev. 349 (1985).

For articles favoring the status quo, see Bedell, Punitive Damages in Arbitration, 21 J. Marshall L. Rev. 121 (1987); Bell, Punitive Damages: Their History, their Use and Their Worth in Present-Day Society, 49 UMKC L. Rev. 1 (1980); Corboy, Are Punitive Damages Getting Out of Control? The Existing Controls are Effective, 70 A.B.A. J. 16 (Dec. 1984); Courtney & Cavico, Punitive Damages: When Are They Justifiable?, 18 Trial 52 (Aug. 1982); and Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest, 18 St. Mary's L.J. 797 (1987).

[33] Professor Prosser, a Reporter for the Restatement (Second) of Torts, conceded that punitive damages in mass torts present a "problem which has arisen to haunt the courts." Noting the issue of multiple awards, he wrote: "The question might well lead to a re-examination of the whole basis and policy of awarding punitive damages." William L. Prosser, The Law of Torts § 2, at 13 (4th ed. 1971).

Furthermore, I do not propose to discuss punitive damages in terms of due process, see Pacific Mut. Life Ins. v. Haslip, 111 S. Ct. 1032, 1043 (1991), nor to consider the serious questions of bias, prejudice, and improper closing arguments to the jury present in this record.

I propose to meet head-on the issue presented here, not in terms of unfairness to the defendants, whatever the merits of that approach might be, but rather from the standpoint of unfairness to injured persons whose claims will come due after available funds have been exhausted. Thus, unlike other courts and commentators.[34] I am not concerned that

---

[34] "[W]e do not believe that defendants should be relieved of liability for punitive damages merely because, through outrageous misconduct, they may have managed to seriously injure a large number of persons. Such a rule would encourage wrongdoers to continue their misconduct because, if they kept it up long enough to injure a large number of people, they could escape all liability for punitive damages." Froud v. Celotex Corp., 107 Ill. App.

allowing defendants in the mass tort context to escape liability for punitive damages might reward them for the extent of harm caused. Such concerns are misplaced in light of the avalanche of compensatory claims against asbestos manufacturers. This has surely served as more of a punishment and deterrent that individual punitive assessments in isolated cases against manufacturers of products in other fields. What matters to the future deserving claimant is the stark reality that unless something is done now the formerly "deep pocket" will soon be empty.

The parochial concerns that have influenced some states to allow punitive damages would justify the majority's

---

3d 654, 437 N.E. 2d 910, 913 (1982), rev'd on other grounds, 98 Ill. 2d 324, 456 N.E. 2d 131 (1983).

decision here. But it is time that some jurisdiction faces up to the realities of the situation and takes a step that might, perhaps, lead others to adopt a broader view. Courts should not wait any longer for congressional and legislative action to correct common law mistakes made by the courts. Errors created by courts can be corrected by courts without engaging in judicial activism.

I am persuaded that, at this point, it is inescapable that the resources available will be exhausted before all deserving claimants have received compensatory damages. Predictions of future events, of course, always carry some risk, but in this instance the storm warnings are too foreboding to be brushed aside. Absolute certainty likely will appear only after disaster has struck, when the time for effective anticipatory

action has vanished. If there is to be error in forecasting, I would prefer that it be in favor of redress for future claimants, rather than largesse for those who have received adequate relief.

The cruel reality underlying this case cannot be ignored. As Chief Judge Clark said in the Jackson case, "[t]his seminal case concerns much more than [an] individual claim.... We know better. Our dockets tell us so ...." 781 F.2d at 416. It is already late in the day, but we have an obligation to take what steps we can.

It should require no extended discussion to conclude that in establishing a proper priority, compensation for victims should rank first. Next must come necessary but reasonable administrative costs

attributable to compensation.[35] Far down the list - if not at the very bottom - should come punitive damages, which are by definition over and above adequate compensation. Punitive damages are an element that can equitably and easily be eliminated.

Under current conditions, it is fanciful to believe that punishment and deterrence are factors worthy of consideration in assessing priorities to limited funds. Here, punitive damages should not be recovered because their purposes are not being served and their benefits are outweighed by their costs to society. Cf. David G. Owen, The Moral Foundations of Punitive Damages. 40 Ala.

---

[35] The high transaction costs of asbestos cases that diminish the pool of available assets have been authoritatively documented. They are also a very serious problem, but that problem cannot be addressed here.

L. Rev. 705, 724-25, 737-39 (1989).[36] In the context of asbestos litigation, penalizing future claimants by awarding more than compensatory damages to early plaintiffs outweighs the asserted benefits to society of punishment and deterrence of wrongdoers.

Society's interest in protecting future claimants demands that present plaintiffs - both those who go to trial and those who settle - forego the "bonus" offered by punitive damages or a high settlement achieved by their threat.

---

[36] Professor Owen, whose endorsement of punitive damages in products liability cases has been widely cited, see David G. Owens, Punitive Damages in Products, Liability Litigation, 74 Mich. L. Rev. 1257, 1325 (1976), stated: "[O]nce the bankruptcy of the defendant manufacturer appears to be a real and imminent possibility, punitive damages should not longer be available at all." It is interesting that in a later law review article. Professor Owen substantially modified his endorsement of punitive damages and cautioned against excessive awards. See David G. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1 (1982).

Courts should recognize that the public interest outweighs the parochial concern in having citizens within its jurisdiction "get theirs" now. Such an approach, after all, is unjust, not only to future claimants in other parts of the country, but within the court's own jurisdiction as well. Accordingly, I would deny punitive damages in asbestos cases within the Virgin Islands.[37]

---

[37] In his dissertation prepared for the LLM program for Judges at the University of Virginia Law School, Judge Surrick concluded that punitive damages have no place in asbestos litigation. He says that balancing social and economic consequences mandates that conclusion He also referred to "judge-made doctrines" of punitive damages in asbestos litigation and says that appellate courts should rise above parochial considerations. "When the reasons for a rule no longer exist, the rule should be abolished." The Honorable R. Barclay Surrick, Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?, 87 Dick. L. Rev. 265, 301 (1983).

II.

COMPENSATORY DAMAGES

The same concerns about a limited fund in some respects must color the court's consideration of compensatory damage verdicts as well. Just as inequitable punitive damages diminish the assets available for future claimants, so do excessive compensatory awards. A sense of fairness requires that trial and appellate court reviews of jury verdicts incorporate some necessary rough equality of treatment for similarly injured individuals. Absolute equality is impossible, but in a broad range some attempt to temper aberrations is appropriate.

It is apparent that in this case the compensatory verdict of $1.3 million was grossly excessive. Recognizing that the

trial judge reduced the award, i would nevertheless reduce it somewhat further.

The plaintiff specifically disavowed any claims for present or future wage loss. Indeed, plaintiff relied on these limitations on recovery in objecting successfully to defense cross-examination about his current employment.

The extent of the plaintiff's disability was hotly contested and the expert testimony sharply conflicting. As might be expected, the medical experts disagreed on the state of the plaintiff's health. Lacking medical backgrounds, the jurors, therefore, were left to choose between the differing evaluations prepared in anticipation of trial.

There was, however, documentary evidence that was not prepared for use at the trial. It provides an appraisal of the plaintiff's health, which does not

support the idea of the extensive injury on which the jury must have rested its large award.

The plaintiff was admitted for surgeries on his knee and shoulder during the spring of 1990, approximately six months before the trial began in November of 1990. The records of the surgeon and hospital in Texas are not concerned with whether or not the plaintiff was suffering with asbestosis, but do give a revealing picture of Mr. Dunn's general health at the time.

The reports of the attending surgeon Dr. Orth described the plaintiff's athletic activities including running, rowing, swimming, and weight lifting. The physician's notes comment that "[h]e has had to give up running recently because of swelling in his left knee" and would "like to have arthroscopic

evaluation to see how the interior of his knee stood in arthritic fashion, and to determine what his future athletic activities should include."

Two months before the trial began, the doctor, in the last of his notes, said that the plaintiff had "been very busy in his work, doing a substantial amount of activities. He states that occasionally he will have to do some heavy work."

The impression gained from the rather extensive notes is of a man who was, and intends to be, more physically active than most men of his age. That picture is not one of an individual who has such a substantial injury and disability as to justify the large verdict awarded here.

When this evidence is considered along with testimony that the plaintiff

was able to work and was gainfully employed at the time of trial, and made no claim for future loss of earnings, the excessiveness of the verdict becomes clear. On the record here, it seems to me that the trial judge's reduction of the $1.3 million verdict to $500,000 was not enough. I would reduce the verdict even further to $100,000, a sum which is substantially in excess of the average jury award or settlement figure for injuries of the nature that the plaintiff claims.

I, therefore, dissent from the majority's affirmance of the judgment entered by the trial judge.

A True Copy:
Teste:

Clerk of the United States
Court of Appeals
For the Third Circuit

FILED
OCT 15 1992
OFFICE OF THE CLERK

No. 92-359

In The

Supreme Court of the United States

October Term, 1992

KEENE CORPORATION,

Petitioner,

v.

LEONARD ADAMS, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Circuit Court Of Monongalia County, West Virginia

RESPONSE TO SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

TYBE A. BRETT*
THEODORE GOLDBERG
HENDERSON & GOLDBERG, P.C.
1030 Fifth Avenue
Pittsburgh, PA 15219
(412) 471-3980

SCOTT S. SEGAL
SEGAL & DAVIS
810 Kanawha Blvd., East
Charleston, WV 25301
(304) 344-9100

Attorneys for Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 5

TABLE OF AUTHORITIES

Page

Dunn v. Hovic, No. 91-3837 (3d Cir. Sept. 18, 1992) 1, 2, 3, 4

Flast v. Cohen, 392 U.S. 83 (1968) 5

Glasscock v. Armstrong Cork Co., 946 F.2d 1085 (5th Cir. 1991), *cert. denied sub nom. Celotex Corp. v. Glasscock*, 112 S.Ct. 1778 (1992) 2

Levy v. Louisiana, 391 U.S. 68 (1968) 4

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 4

Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2d Cir.), *cert. dismissed*, 111 S.Ct. 27 (1991) 3

United States Parole Commission v. Geraghty, 445 U.S. 388 (1980) 5

ARGUMENT

Keene Corporation ("Keene") has filed a Supplemental Brief in Support of Petition for a Writ of Certiorari based upon the recent decision of the Third Circuit Court of Appeals in *Dunn v. Hovic*, No. 91-3837 (3d Cir. Sept. 18, 1992). Keene cites the dissent in *Dunn* as support for its argument that punitive damages should be struck from all asbestos cases.

In *Dunn*, the jury awarded the asbestos plaintiff $1.3 million in compensatory damages and $25 million in punitive damages following a trial against a single defendant, which was remitted to $500,000 in compensatory damages and $2 million in punitives. The majority in *Dunn* affirmed the judgment for many of the same reasons that Respondents cite to urge this Court to deny Keene's Petition for a Writ of Certiorari.

The Court of Appeals in *Dunn* recognized the sufficiency of the evidence under Virgin Islands law (Sa 37 - Sa 48), and refused to find error in the jury instructions where the defendant proffered only a general supplemental instruction, made a general objection and failed to specifically inform the court how to provide clearer standards. (Sa 55 - Sa 62). Similarly here, Petitioner does not complain about the sufficiency of the evidence or about error in the instructions, and this Court must assume that the evidence was sufficient under West Virginia law to support an award of punitive damages and that the trial court correctly charged the jury on punitive damages.

The *Dunn* court also recognized that appellate courts have affirmed punitive damage awards involving comparable ratios of compensatories to punitives, and found

that the large punitive damage award should be affirmed if remitted. In the case *sub judice,* punitive damages of $5,000 per plaintiff, when the compensatory damages ranged from $15,000 to $324,000, can hardly be regarded as tainted by passion and prejudice. Indeed, given the much larger awards in cases that this Court has refused to review, such as a total of $6.1 million in punitive damages awarded to eleven plaintiffs in *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied sub nom. Celotex Corp. v. Glasscock*, 112 S. Ct. 1778 (1992), an award of $105,000 to twenty-one plaintiffs is nominal.

The *Dunn* majority's consideration of successive punitive damage awards in asbestos cases is particularly relevant to the arguments raised by Keene in its Petition. First, the Third Circuit recognized that the legislature and not the judiciary is the appropriate forum for determining whether successive claims of punitive damages for multiple personal injuries should be allowed. (Sa 89 - Sa 90). A court adjudicating an individual case is not the appropriate body to resolve the conflicting policy arguments. (Sa 92).

Second, the Third Circuit was not persuaded by the defendant's claims that punitive damages in asbestos cases are as a general matter unconstitutional. The Court of Appeals recognized that the commentary calling for abolition of punitive damages recited by the defendant could be countered with an impressive array of empirical studies concluding that both the frequency and size of punitive damage awards is much less than generally believed. (Sa 93 - Sa 96). Moreover, the defendant in *Dunn* "failed to submit evidence concerning the actual amount it or other asbestos manufacturers have actually paid to

satisfy punitive damages verdicts and simply has not made a 'showing that the total [amount of punitive damages assessed so far] is even close to whatever limit due process might impose on the total punitive damages that may be assessed . . . for . . . misconduct with respect to asbestos warnings.' " (Sa 97) (quoting *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281 (2d Cir.), *cert. dismissed*, 111 S. Ct. 27 (1991)). The *Dunn* majority properly rejected the defendant's attempt to create its factual record for the first time in the appellate court. Keene, too, made no factual record in the lower court as to the nature and extent of any punitive awards.

The *Dunn* court noted that although the costs associated with asbestos litigation may have wiped out any profits defendant made from the sale of its asbestos products, the defendant failed to submit evidence at trial concerning the profitability of its own asbestos products or those of other manufacturers. "In any event, neither Virgin Islands law nor due process requires striking all punitive damage claims simply because the harm caused by a defective product was so severe as to wipe out all profit." (Sa 99).

Respondents' discussion in their Response to Keene's Petition for a Writ of Certiorari tracks this analysis. Keene, like the defendant in *Dunn*, seeks to have an appellate court review factual information, raised for the first time in its petition to this Court, that it never proffered for consideration by the jury, despite being afforded the opportunity to do so. Like the Third Circuit, this Court cannot be transformed into a fact finding body in

cases involving punitive damages in asbestos cases, particularly where the evidence of egregious conduct affecting vast numbers of victims is so overwhelming.

The arguments of the dissenting judge in *Dunn* are premised on his belief that punitive damages are a windfall to plaintiffs. (Sa 109). These arguments have no relevance to the instant case in which twenty-one plaintiffs were each awarded a nominal $5,000 in punitive damages. The jury awarded to each of these plaintiffs compensatory damages in an amount of more than $5,000, but many of these compensatory awards were not paid because of plaintiffs' fortuitous settlements with others. Certainly there was no windfall to Respondents.

Moreover, Judge Weis's suggestion that a panel of judges deciding an individual case is institutionally competent to bind all asbestos plaintiffs, without recognizing any need for a class certification proceeding or other type of proceeding establishing that all victims can be bound by such a determination and without requiring a determination that there exists a limited fund, emasculates all notions of due process as established by this Court as recently as *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).[1]

The "business of federal courts [is limited] to 'questions presented in an adversary context and in a form historically viewed as capable of resolution through the

---

[1] To hold that asbestos plaintiffs are prohibited from recovering punitive damages may also raise substantive due process and equal protection problems. *See, e.g., Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968).

judicial process . . . to assure that the federal courts will not intrude into areas committed to the other branches of government.' " *United States Parole Commission v. Geraghty*, 445 U.S. 388, 395-96 (1980) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). Certainly, this Court should not be persuaded to legislate a "broader view," to assume a role that is constitutionally proscribed by the doctrine of separation of powers or to intrude in a process that it has previously recognized is traditionally the province of state law.

CONCLUSION

Accordingly, for the reasons set forth in the Response to Petition for a Writ of Certiorari and those set forth above, Keene's Petition of a Writ of Certiorari must be denied.

Respectfully submitted,

TYBE A. BRETT, ESQUIRE
Counsel of Record
THEODORE GOLDBERG, ESQUIRE
HENDERSON & GOLDBERG, P.C.
1030 Fifth Avenue
Pittsburgh, PA 15219
(412) 471-3980

SCOTT S. SEGAL, ESQUIRE
SEGAL & DAVIS
810 Kanawha Blvd., East
Charleston, WV 25301
(304) 344-9100

Attorneys for Respondents

Dated: October 14, 1992